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A

DISQUISITION

ON

GOVERNMENT

AND

A DISCOURSE

ON THE

CONSTITUTION AND GOVERNMENT OF THE UNITED STATES.

BY

JOHN C. CALHOUN.

EDITED BY

RICHARD K. CRALLE.

NEW-YORK:
D. APPLETON & COMPANY,
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ADVERTISEMENT.

It may be proper to state, that the manuscripts from which the following work is published, were never revised or corrected by their illustrious author. When, during his last illness, they were placed by him in the hands of the editor, he indulged the hope of regaining sufficient strength to perform this labor; but it is scarcely necessary to say that the expectation was never realized. The Disquisition on Government had, indeed, been copied before his death; but it is almost certain he never found time to examine the copy. The Discourse on the Constitution, &c.—with the exception of a few pages,—was in his own handwriting,—on loose sheets,—bearing evident marks of interrupted and hurried composition. Indeed, there is reason to believe that the principal portion of it, if not the entire Work, was composed between the adjournment of Congress in the Spring of 1848, and its meeting in December, 1849.

In preparing the manuscripts for the press, the editor has sedulously endeavored to preserve, not only the peculiar modes of expression, but the very words of the author;—without regard to ornaments of style or rules of criticism. They who knew him well, need not to be told that, to these, he paid but slight respect. Absorbed by his subject, and earnest in his efforts to present the truth to others, as it appeared to himself, he regarded neither the arts nor the ornaments of meretricious elocution. He wrote as

he spoke, sometimes negligently, yet always plainly and forcibly, and it is due to his own character, as well as to the public expectation, that his views should be presented in the plain and simple garb in which he left them. The granite statue, rough-hewn though it be, is far more imposing in its simple and stern, though rude proportions, than the plaster-cast, however elaborately wrought and gilded. Some few sentences have been transposed,—some repetitions omitted,—and some verbal inaccuracies, necessarily incident to hurried composition, corrected. With these exceptions, and they are comparatively few,—the Work is as it came from the hands of the author; and is given to the public with no other comment than that made by himself in a letter dated the 4th of November, 1849—"I wish my errors to be pointed out. I have set down only what I believed to be true; without yielding an inch to the popular opinions and prejudices of the day. I have not dilated,—but left truth, plainly announced, to battle its own way."

February 22d, 1851.

A DISQUISITION ON GOVERNMENT.

In order to have a clear and just conception of the nature and object of government, it is indispensable to understand correctly what that constitution or law of our nature is, in which government originates; or, to express it more fully and accurately,—that law, without which government would not, and with which, it must necessarily exist. Without this, it is as impossible to lay any solid foundation for the science of government, as it would be to lay one for that of astronomy, without a like understanding of that constitution or law of the material world, according to which the several bodies composing the solar system mutually act on each other, and by which they are kept in their respective spheres. The first question, accordingly, to be considered is,—What is that constitution or law of our nature, without which government would not exist, and with which its existence is necessary?

In considering this, I assume, as an incontestable fact, that man is so constituted as to be a social be-

ing. His inclinations and wants, physical and moral, irresistibly impel him to associate with his kind; and he has, accordingly, never been found, in any age or country, in any state other than the social. In no other, indeed, could he exist; and in no other, —were it possible for him to exist,—could he attain to a full development of his moral and intellectual faculties, or raise himself, in the scale of being, much above the level of the brute creation.

I next assume, also, as a fact not less incontestable, that, while man is so constituted as to make the social state necessary to his existence and the full development of his faculties, this state itself cannot exist without government. The assumption rests on universal experience. In no age or country has any society or community ever been found, whether enlightened or savage, without government of some description.

Having assumed these, as unquestionable phenomena of our nature, I shall, without further remark, proceed to the investigation of the primary and important question,—What is that constitution of our nature, which, while it impels man to associate with his kind, renders it impossible for society to exist without government?

The answer will be found in the fact, (not less incontestable than either of the others,) that, while man is created for the social state, and is accordingly so formed as to feel what affects others, as well as what affects himself, he is, at the same time, so constituted as to feel more intensely what affects him directly, than what affects him indirectly

through others; or, to express it differently, he is so constituted, that his direct or individual affections are stronger than his sympathetic or social feelings. I intentionally avoid the expression, *selfish* feelings, as applicable to the former; because, as commonly used, it implies an unusual excess of the individual over the social feelings, in the person to whom it is applied; and, consequently, something depraved and vicious. My object is, to exclude such inference, and to restrict the inquiry exclusively to facts in their bearings on the subject under consideration, viewed as mere phenomena appertaining to our nature,—constituted as it is; and which are as unquestionable as is that of gravitation, or any other phenomenon of the material world.

In asserting that our individual are stronger than our social feelings, it is not intended to deny that there are instances, growing out of peculiar relations,—as that of a mother and her infant,—or resulting from the force of education and habit over peculiar constitutions, in which the latter have overpowered the former; but these instances are few, and always regarded as something extraordinary. The deep impression they make, whenever they occur, is the strongest proof that they are regarded as exceptions to some general and well understood law of our nature; just as some of the minor powers of the material world are apparently to gravitation.

I might go farther, and assert this to be a phenomenon, not of our nature only, but of all animated existence, throughout its entire range, so far as our

knowledge extends. It would, indeed, seem to be essentially connected with the great law of self-preservation which pervades all that feels, from man down to the lowest and most insignificant reptile or insect. In none is it stronger than in man. His social feelings may, indeed, in a state of safety and abundance, combined with high intellectual and moral culture, acquire great expansion and force; but not so great as to overpower this all-pervading and essential law of animated existence.

But that constitution of our nature which makes us feel more intensely what affects us directly than what affects us indirectly through others, necessarily leads to conflict between individuals. Each, in consequence, has a greater regard for his own safety or happiness, than for the safety or happiness of others; and, where these come in opposition, is ready to sacrifice the interests of others to his own. And hence, the tendency to a universal state of conflict, between individual and individual; accompanied by the connected passions of suspicion, jealousy, anger and revenge,—followed by insolence, fraud and cruelty;—and, if not prevented by some controlling power, ending in a state of universal discord and confusion, destructive of the social state and the ends for which it is ordained. This controlling power, wherever vested, or by whomsoever exercised, is GOVERNMENT.

It follows, then, that man is so constituted, that government is necessary to the existence of society, and society to his existence, and the perfection of his faculties. It follows, also, that government has its

origin in this twofold constitution of his nature; the sympathetic or social feelings constituting the remote, —and the individual or direct, the proximate cause.

If man had been differently constituted in either particular;—if, instead of being social in his nature, he had been created without sympathy for his kind, and independent of others for his safety and existence; or if, on the other hand, he had been so created, as to feel more intensely what affected others than what affected himself, (if that were possible,) or, even, had this supposed interest been equal,— it is manifest that, in either case, there would have been no necessity for government, and that none would ever have existed. But, although society and government are thus intimately connected with and dependent on each other,—of the two society is the greater. It is the first in the order of things, and in the dignity of its object; that of society being primary,—to preserve and perfect our race; and that of government secondary and subordinate, to preserve and perfect society. Both are, however, necessary to the existence and well-being of our race, and equally of Divine ordination.

I have said,—if it were possible for man to be so constituted, as to feel what affects others more strongly than what affects himself, or even as strongly,—because, it may be well doubted, whether the stronger feeling or affection of individuals for themselves, combined with a feebler and subordinate feeling or affection for others, is not, in beings of limited reason and faculties, a constitution necessary to their preservation and existence. If reversed,—if their

feelings and affections were stronger for others than for themselves, or even as strong, the necessary result would seem to be, that all individuality would be lost; and boundless and remediless disorder and confusion would ensue. For each, at the same moment, intensely participating in all the conflicting emotions of those around him, would, of course, forget himself and all that concerned him immediately, in his officious intermeddling with the affairs of all others; which, from his limited reason and faculties, he could neither properly understand nor manage. Such a state of things would, as far as we can see, lead to endless disorder and confusion, not less destructive to our race than a state of anarchy. It would, besides, be remediless,—for government would be impossible; or, if it could by possibility exist, its object would be reversed. Selfishness would have to be encouraged, and benevolence discouraged. Individuals would have to be encouraged, by rewards, to become more selfish, and deterred, by punishments, from being too benevolent; and this, too, by a government, administered by those who, on the supposition, would have the greatest aversion for selfishness and the highest admiration for benevolence.

To the Infinite Being, the Creator of all, belongs exclusively the care and superintendence of the whole. He, in his infinite wisdom and goodness, has allotted to every class of animated beings its condition and appropriate functions; and has endowed each with feelings, instincts, capacities, and faculties, best adapted to its allotted condition. To man, he has assigned the social and political state,

as best adapted to develop the great capacities and faculties, intellectual and moral, with which he has endowed him; and has, accordingly, constituted him so as not only to impel him into the social state, but to make government necessary for his preservation and well-being.

But government, although intended to protect and preserve society, has itself a strong tendency to disorder and abuse of its powers, as all experience and almost every page of history testify. The cause is to be found in the same constitution of our nature which makes government indispensable. The powers which it is necessary for government to possess, in order to repress violence and preserve order, cannot execute themselves. They must be administered by men in whom, like others, the individual are stronger than the social feelings. And hence, the powers vested in them to prevent injustice and oppression on the part of others, will, if left unguarded, be by them converted into instruments to oppress the rest of the community. That, by which this is prevented, by whatever name called, is what is meant by CONSTITUTION, in its most comprehensive sense, when applied to GOVERNMENT.

Having its origin in the same principle of our nature, *constitution* stands to *government*, as *government* stands to *society;* and, as the end for which society is ordained, would be defeated without government, so that for which government is ordained would, in a great measure, be defeated without constitution. But they differ in this striking particular. There is no difficulty in forming govern-

ment. It is not even a matter of choice, whether there shall be one or not. Like breathing, it is not permitted to depend on our volition. Necessity will force it on all communities in some one form or another. Very different is the case as to constitution. Instead of a matter of necessity, it is one of the most difficult tasks imposed on man to form a constitution worthy of the name; while, to form a perfect one,—one that would completely counteract the tendency of government to oppression and abuse, and hold it strictly to the great ends for which it is ordained,—has thus far exceeded human wisdom, and possibly ever will. From this, another striking difference results. Constitution is the contrivance of man, while government is of Divine ordination. Man is left to perfect what the wisdom of the Infinite ordained, as necessary to preserve the race.

With these remarks, I proceed to the consideration of the important and difficult question: How is this tendency of government to be counteracted? Or, to express it more fully,—How can those who are invested with the powers of government be prevented from employing them, as the means of aggrandizing themselves, instead of using them to protect and preserve society? It cannot be done by instituting a higher power to control the government, and those who administer it. This would be but to change the seat of authority, and to make this higher power, in reality, the government; with the same tendency, on the part of those who might control its powers, to pervert them into instruments

of aggrandizement. Nor can it be done by limiting the powers of government, so as to make it too feeble to be made an instrument of abuse; for, passing by the difficulty of so limiting its powers, without creating a power higher than the government itself to enforce the observance of the limitations, it is a sufficient objection that it would, if practicable, defeat the end for which government is ordained, by making it too feeble to protect and preserve society. The powers necessary for this purpose will ever prove sufficient to aggrandize those who control it, at the expense of the rest of the community.

In estimating what amount of power would be requisite to secure the objects of government, we must take into the reckoning, what would be necessary to defend the community against external, as well as internal dangers. Government must be able to repel assaults from abroad, as well as to repress violence and disorders within. It must not be overlooked, that the human race is not comprehended in a single society or community. The limited reason and faculties of man, the great diversity of language, customs, pursuits, situation and complexion, and the difficulty of intercourse, with various other causes, have, by their operation, formed a great many separate communities, acting independently of each other. Between these there is the same tendency to conflict,—and from the same constitution of our nature,—as between men individually; and even stronger,—because the sympathetic or social feelings are not so strong between different

communities, as between individuals of the same community. So powerful, indeed, is this tendency, that it has led to almost incessant wars between contiguous communities for plunder and conquest, or to avenge injuries, real or supposed.

So long as this state of things continues, exigencies will occur, in which the entire powers and resources of the community will be needed to defend its existence. When this is at stake, every other consideration must yield to it. Self-preservation is the supreme law, as well with communities as individuals. And hence the danger of withholding from government the full command of the power and resources of the state; and the great difficulty of limiting its powers consistently with the protection and preservation of the community. And hence the question recurs,—By what means can government, without being divested of the full command of the resources of the community, be prevented from abusing its powers?

The question involves difficulties which, from the earliest ages, wise and good men have attempted to overcome;—but hitherto with but partial success. For this purpose many devices have been resorted to, suited to the various stages of intelligence and civilization through which our race has passed, and to the different forms of government to which they have been applied. The aid of superstition, ceremonies, education, religion, organic arrangements, both of the government and the community, has been, from time to time, appealed to. Some of the most remarkable of these devices,

whether regarded in reference to their wisdom and the skill displayed in their application, or to the permanency of their effects, are to be found in the early dawn of civilization ;—in the institutions of the Egyptians, the Hindoos, the Chinese, and the Jews. The only materials which that early age afforded for the construction of constitutions, when intelligence was so partially diffused, were applied with consummate wisdom and skill. To their successful application may be fairly traced the subsequent advance of our race in civilization and intelligence, of which we now enjoy the benefits. For, without a constitution,—something to counteract the strong tendency of government to disorder and abuse, and to give stability to political institutions,—there can be little progress or permanent improvement.

In answering the important question under consideration, it is not necessary to enter into an examination of the various contrivances adopted by these celebrated governments to counteract this tendency to disorder and abuse, nor to undertake to treat of constitution in its most comprehensive sense. What I propose is far more limited,—to explain on what principles government must be formed, in order to resist, by its own interior structure,—or, to use a single term, *organism*,—the tendency to abuse of power. This structure, or organism, is what is meant by constitution, in its strict and more usual sense; and it is this which distinguishes, what are called, constitutional governments from absolute. It is in this strict and more usual sense that I propose to use the term hereafter.

How government, then, must be constructed, in order to counteract, through its organism, this tendency on the part of those who make and execute the laws to oppress those subject to their operation, is the next question which claims attention.

There is but one way in which this can possibly be done; and that is, by such an organism as will furnish the ruled with the means of resisting successfully this tendency on the part of the rulers to oppression and abuse. Power can only be resisted by power,—and tendency by tendency. Those who exercise power and those subject to its exercise,—the rulers and the ruled,—stand in antagonistic relations to each other. The same constitution of our nature which leads rulers to oppress the ruled,—regardless of the object for which government is ordained,—will, with equal strength, lead the ruled to resist, when possessed of the means of making peaceable and effective resistance. Such an organism, then, as will furnish the means by which resistance may be systematically and peaceably made on the part of the ruled, to oppression and abuse of power on the part of the rulers, is the first and indispensable step towards *forming* a constitutional government. And as this can only be effected by or through the right of suffrage,—(the right on the part of the ruled to choose their rulers at proper intervals, and to hold them thereby responsible for their conduct,)—the responsibility of the rulers to the ruled, through the right of suffrage, is the indispensable and primary principle in the *foundation* of a constitutional government. When this

right is properly guarded, and the people sufficiently enlightened to understand their own rights and the interests of the community, and duly to appreciate the motives and conduct of those appointed to make and execute the laws, it is all-sufficient to give to those who elect, effective control over those they have elected.

I call the right of suffrage the indispensable and primary principle; for it would be a great and dangerous mistake to suppose, as many do, that it is, of itself, sufficient to form constitutional governments. To this erroneous opinion may be traced one of the causes, why so few attempts to form constitutional governments have succeeded; and why, of the few which have, so small a number have had durable existence. It has led, not only to mistakes in the attempts to form such governments, but to their overthrow, when they have, by some good fortune, been correctly formed. So far from being, of itself, sufficient,—however well guarded it might be, and however enlightened the people,—it would, unaided by other provisions, leave the government as absolute, as it would be in the hands of irresponsible rulers; and with a tendency, at least as strong, towards oppression and abuse of its powers; as I shall next proceed to explain.

The right of suffrage, of itself, can do no more than give complete control to those who elect, over the conduct of those they have elected. In doing this, it accomplishes all it possibly can accomplish. This is its aim,—and when this is attained, its end is fulfilled. It can do no more, however enlightened

the people, or however widely extended or well guarded the right may be. The sum total, then, of its effects, when most successful, is, to make those elected, the true and faithful representatives of those who elected them,—instead of irresponsible rulers, —as they would be without it; and thus, by converting it into an agency, and the rulers into agents, to divest government of all claims to sovereignty, and to retain it unimpaired to the community. But it is manifest that the right of suffrage, in making these changes, transfers, in reality, the actual control over the government, from those who make and execute the laws, to the body of the community; and, thereby, places the powers of the government as fully in the mass of the community, as they would be if they, in fact, had assembled, made, and executed the laws themselves, without the intervention of representatives or agents. The more perfectly it does this, the more perfectly it accomplishes its ends; but in doing so, it only changes the seat of authority, without counteracting, in the least, the tendency of the government to oppression and abuse of its powers.

If the whole community had the same interests, so that the interests of each and every portion would be so affected by the action of the government, that the laws which oppressed or impoverished one portion, would necessarily oppress and impoverish all others,—or the reverse,—then the right of suffrage, of itself, would be all-sufficient to counteract the tendency of the government to oppression and abuse of its powers; and, of course,

would form, of itself, a perfect constitutional government. The interest of all being the same, by supposition, as far as the action of the government was concerned, all would have like interests as to what laws should be made, and how they should be executed. All strife and struggle would cease as to who should be elected to make and execute them. The only question would be, who was most fit; who the wisest and most capable of understanding the common interest of the whole. This decided, the election would pass off quietly, and without party discord; as no one portion could advance its own peculiar interest without regard to the rest, by electing a favorite candidate.

But such is not the case. On the contrary, nothing is more difficult than to equalize the action of the government, in reference to the various and diversified interests of the community; and nothing more easy than to pervert its powers into instruments to aggrandize and enrich one or more interests by oppressing and impoverishing the others; and this too, under the operation of laws, couched in general terms;—and which, on their face, appear fair and equal. Nor is this the case in some particular communities only. It is so in all; the small and the great,—the poor and the rich,—irrespective of pursuits, productions, or degrees of civilization; —with, however, this difference, that the more extensive and populous the country, the more diversified the condition and pursuits of its population, and the richer, more luxurious, and dissimilar the people, the more difficult is it to equalize the action

of the government,—and the more easy for one portion of the community to pervert its powers to oppress, and plunder the other.

Such being the case, it necessarily results, that the right of suffrage, by placing the control of the government in the community must, from the same constitution of our nature which makes government necessary to preserve society, lead to conflict among its different interests,—each striving to obtain possession of its powers, as the means of protecting itself against the others;—or of advancing its respective interests, regardless of the interests of others. For this purpose, a struggle will take place between the various interests to obtain a majority, in order to control the government. If no one interest be strong enough, of itself, to obtain it, a combination will be formed between those whose interests are most alike;—each conceding something to the others, until a sufficient number is obtained to make a majority. The process may be slow, and much time may be required before a compact, organized majority can be thus formed; but formed it will be in time, even without preconcert or design, by the sure workings of that principle or constitution of our nature in which government itself originates. When once formed, the community will be divided into two great parties,—a major and minor,—between which there will be incessant struggles on the one side to retain, and on the other to obtain the majority,—and, thereby, the control of the government and the advantages it confers.

So deeply seated, indeed, is this tendency to conflict between the different interests or portions of the community, that it would result from the action of the government itself, even though it were possible to find a community, where the people were all of the same pursuits, placed in the same condition of life, and in every respect, so situated, as to be without inequality of condition or diversity of interests. The advantages of possessing the control of the powers of the government, and, thereby, of its honors and emoluments, are, of themselves, exclusive of all other considerations, ample to divide even such a community into two great hostile parties.

In order to form a just estimate of the full force of these advantages,—without reference to any other consideration,—it must be remembered, that government,—to fulfill the ends for which it is ordained, and more especially that of protection against external dangers,—must, in the present condition of the world, be clothed with powers sufficient to call forth the resources of the community, and be prepared, at all times, to command them promptly in every emergency which may possibly arise. For this purpose large establishments are necessary, both civil and military, (including naval, where, from situation, that description of force may be required,) with all the means necessary for prompt and effective action,—such as fortifications, fleets, armories, arsenals, magazines, arms of all descriptions, with well-trained forces, in sufficient numbers to wield them with skill and energy,

whenever the occasion requires it. The administration and management of a government with such vast establishments must necessarily require a host of employees, agents, and officers;—of whom many must be vested with high and responsible trusts, and occupy exalted stations, accompanied with much influence and patronage. To meet the necessary expenses, large sums must be collected and disbursed; and, for this purpose, heavy taxes must be imposed, requiring a multitude of officers for their collection and disbursement. The whole united must necessarily place under the control of government an amount of honors and emoluments, sufficient to excite profoundly the ambition of the aspiring and the cupidity of the avaricious; and to lead to the formation of hostile parties, and violent party conflicts and struggles to obtain the control of the government. And what makes this evil remediless, through the right of suffrage of itself, however modified or carefully guarded, or however enlightened the people, is the fact that, as far as the honors and emoluments of the government and its fiscal action are concerned, it is impossible to equalize it. The reason is obvious. Its honors and emoluments, however great, can fall to the lot of but a few, compared to the entire number of the community, and the multitude who will seek to participate in them. But, without this, there is a reason which renders it impossible to equalize the action of the government, so far as its fiscal operation extends,—which I shall next explain.

Few, comparatively, as they are, the agents and

employees of the government constitute that portion of the community who are the exclusive recipients of the proceeds of the taxes. Whatever amount is taken from the community, in the form of taxes, if not lost, goes to them in the shape of expenditures or disbursements. The two,—disbursement and taxation,—constitute the fiscal action of the government. They are correlatives. What the one takes from the community, under the name of taxes, is transferred to the portion of the community who are the recipients, under that of disbursements. But, as the recipients constitute only a portion of the community, it follows, taking the two parts of the fiscal process together, that its action must be unequal between the payers of the taxes and the recipients of their proceeds. Nor can it be otherwise, unless what is collected from each individual in the shape of taxes, shall be returned to him, in that of disbursements; which would make the process nugatory and absurd. Taxation may, indeed, be made equal, regarded separately from disbursement. Even this is no easy task; but the two united cannot possibly be made equal.

Such being the case, it must necessarily follow, that some one portion of the community must pay in taxes more than it receives back in disbursements; while another receives in disbursements more than it pays in taxes. It is, then, manifest, taking the whole process together, that taxes must be, in effect, bounties to that portion of the community which receives more in disbursements than it pays in taxes; while, to the other which pays in taxes more than

it receives in disbursements, they are taxes in reality,—burthens, instead of bounties. This consequence is unavoidable. It results from the nature of the process, be the taxes ever so equally laid, and the disbursements ever so fairly made, in reference to the public service.

It is assumed, in coming to this conclusion, that the disbursements are made within the community. The reasons assigned would not be applicable if the proceeds of the taxes were paid in tribute, or expended in foreign countries. In either of these cases, the burthen would fall on all, in proportion to the amount of taxes they respectively paid.

Nor would it be less a bounty to the portion of the community which received back in disbursements more than it paid in taxes, because received as salaries for official services; or payments to persons employed in executing the works required by the government; or furnishing it with its various supplies; or any other description of public employment,—instead of being bestowed gratuitously. It is the disbursements which give additional, and, usually, very profitable and honorable employments to the portion of the community where they are made. But to create such employments, by disbursements, is to bestow on the portion of the community to whose lot the disbursements may fall, a far more durable and lasting benefit,—one that would add much more to its wealth and population,—than would the bestowal of an equal sum gratuitously: and hence, to the extent that the disbursements exceed the taxes, it may be fairly regarded as a bounty.

The very reverse is the case in reference to the portion which pays in taxes more than it receives in disbursements. With them, profitable employments are diminished to the same extent, and population and wealth correspondingly decreased.

The necessary result, then, of the unequal fiscal action of the government is, to divide the community into two great classes; one consisting of those who, in reality, pay the taxes, and, of course, bear exclusively the burthen of supporting the government; and the other, of those who are the recipients of their proceeds, through disbursements, and who are, in fact, supported by the government; or, in fewer words, to divide it into tax-payers and tax-consumers.

But the effect of this is to place them in antagonistic relations, in reference to the fiscal action of the government, and the entire course of policy therewith connected. For, the greater the taxes and disbursements, the greater the gain of the one and the loss of the other,—and *vice versa;* and consequently, the more the policy of the government is calculated to increase taxes and disbursements, the more it will be favored by the one and opposed by the other.

The effect, then, of every increase is, to enrich and strengthen the one, and impoverish and weaken the other. This, indeed, may be carried to such an extent, that one class or portion of the community may be elevated to wealth and power, and the other depressed to abject poverty and dependence, simply by the fiscal action of the government; and

this too, through disbursements only,—even under a system of equal taxes imposed for revenue only. If such may be the effect of taxes and disbursements, when confined to their legitimate objects,—that of raising revenue for the public service,—some conception may be formed, how one portion of the community may be crushed, and another elevated on its ruins, by systematically perverting the power of taxation and disbursement, for the purpose of aggrandizing and building up one portion of the community at the expense of the other. That it *will* be so used, unless prevented, is, from the constitution of man, just as certain as that it *can* be so used; and that, if not prevented, it must give rise to two parties, and to violent conflicts and struggles between them, to obtain the control of the government, is, for the same reason, not less certain.

Nor is it less certain, from the operation of all these causes, that the dominant majority, for the time, would have the same tendency to oppression and abuse of power, which, without the right of suffrage, irresponsible rulers would have. No reason, indeed, can be assigned, why the latter would abuse their power, which would not apply, with equal force, to the former. The dominant majority, for the time, would, in reality, through the right of suffrage, be the rulers—the controlling, governing, and irresponsible power; and those who make and execute the laws would, for the time, be, in reality, but *their* representatives and agents.

Nor would the fact that the former would constitute a majority of the community, counteract a

tendency originating in the constitution of man; and which, as such, cannot depend on the number by whom the powers of the government may be wielded. Be it greater or smaller, a majority or minority, it must equally partake of an attribute inherent in each individual composing it; and, as in each the individual is stronger than the social feelings, the one would have the same tendency as the other to oppression and abuse of power. The reason applies to government in all its forms,—whether it be that of the one, the few, or the many. In each there must, of necessity, be a governing and governed,—a ruling and a subject portion. The one implies the other; and in all, the two bear the same relation to each other;—and have, on the part of the governing portion, the same tendency to oppression and abuse of power. Where the majority is that portion, it matters not how its powers may be exercised;—whether directly by themselves, or indirectly, through representatives or agents. Be it which it may, the minority, for the time, will be as much the governed or subject portion, as are the people in an aristocracy, or the subjects in a monarchy. The only difference in this respect is, that in the government of a majority, the minority may become the majority, and the majority the minority, through the right of suffrage; and thereby change their relative positions, without the intervention of force and revolution. But the duration, or uncertainty of the tenure, by which power is held, cannot, of itself, counteract the tendency inherent in government to

oppression and abuse of power. On the contrary, the very uncertainty of the tenure, combined with the violent party warfare which must ever precede a change of parties under such governments, would rather tend to increase than diminish the tendency to oppression.

As, then, the right of suffrage, without some other provision, cannot counteract this tendency of government, the next question for consideration is —What is that other provision? This demands the most serious consideration; for of all the questions embraced in the science of government, it involves a principle, the most important, and the least understood; and when understood, the most difficult of application in practice. It is, indeed, emphatically, that principle which *makes* the constitution, in its strict and limited sense.

From what has been said, it is manifest, that this provision must be of a character calculated to prevent any one interest, or combination of interests, from using the powers of government to aggrandize itself at the expense of the others. Here lies the evil: and just in proportion as it shall prevent, or fail to prevent it, in the same degree it will effect, or fail to effect the end intended to be accomplished. There is but one certain mode in which this result can be secured; and that is, by the adoption of some restriction or limitation, which shall so effectually prevent any one interest, or combination of interests, from obtaining the exclusive control of the government, as to render hopeless all attempts directed to that end. There is, again, but one mode

in which this can be effected; and that is, by taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to require the consent of each interest, either to put or to keep the government in action. This, too, can be accomplished only in one way,—and that is, by such an organism of the government,—and, if necessary for the purpose, of the community also,—as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution. It is only by such an organism, that the assent of each can be made necessary to put the government in motion; or the power made effectual to arrest its action, when put in motion;—and it is only by the one or the other that the different interests, orders, classes, or portions, into which the community may be divided, can be protected, and all conflict and struggle between them prevented,—by rendering it impossible to put or to keep it in action, without the concurrent consent of all.

Such an organism as this, combined with the right of suffrage, constitutes, in fact, the elements of constitutional government. The one, by rendering those who make and execute the laws responsible to those on whom they operate, prevents the rulers from oppressing the ruled; and the other, by making it impossible for any one interest or

combination of interests or class, or order, or portion of the community, to obtain exclusive control, prevents any one of them from oppressing the other. It is clear, that oppression and abuse of power must come, if at all, from the one or the other quarter. From no other can they come. It follows, that the two, suffrage and proper organism combined, are sufficient to counteract the tendency of government to oppression and abuse of power; and to restrict it to the fulfilment of the great ends for which it is ordained.

In coming to this conclusion, I have assumed the organism to be perfect, and the different interests, portions, or classes of the community, to be sufficiently enlightened to understand its character and object, and to exercise, with due intelligence, the right of suffrage. To the extent that either may be defective, to the same extent the government would fall short of fulfilling its end. But this does not impeach the truth of the principles on which it rests. In reducing them to proper form, in applying them to practical uses, all elementary principles are liable to difficulties; but they are not, on this account, the less true, or valuable. Where the organism is perfect, every interest will be truly and fully represented, and of course the whole community must be so. It may be difficult, or even impossible, to make a perfect organism,—but, although this be true, yet even when, instead of the sense of each and of all, it takes that of a few great and prominent interests only, it would still, in a great measure, if not altogether, fulfil the end intended

by a constitution. For, in such case, it would require so large a portion of the community, compared with the whole, to concur, or acquiesce in the action of the government, that the number to be plundered would be too few, and the number to be aggrandized too many, to afford adequate motives to oppression and the abuse of its powers. Indeed, however imperfect the organism, it must have more or less effect in diminishing such tendency.

It may be readily inferred, from what has been stated, that the effect of organism is neither to supersede nor diminish the importance of the right of suffrage; but to aid and perfect it. The object of the latter is, to collect the sense of the community. The more fully and perfectly it accomplishes this, the more fully and perfectly it fulfils its end. But the most it can do, of itself, is to collect the sense of the greater number; that is, of the stronger interests, or combination of interests; and to assume this to be the sense of the community. It is only when aided by a proper organism, that it can collect the sense of the entire community,—of each and all its interests; of each, through its appropriate organ, and of the whole, through all of them united. This would truly be the sense of the entire community; for whatever diversity each interest might have within itself,—as all would have the same interest in reference to the action of the government, the individuals composing each would be fully and truly represented by its own majority or appropriate organ, regarded in reference to the other interests. In brief, every individual of every interest might

trust, with confidence, its majority or appropriate organ, against that of every other interest.

It results, from what has been said, that there are two different modes in which the sense of the community may be taken; one, simply by the right of suffrage, unaided; the other, by the right through a proper organism. Each collects the sense of the majority. But one regards numbers only, and considers the whole community as a unit, having but one common interest throughout; and collects the sense of the greater number of the whole, as that of the community. The other, on the contrary, regards interests as well as numbers;—considering the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each, through its majority or appropriate organ, and the united sense of all, as the sense of the entire community. The former of these I shall call the numerical, or absolute majority; and the latter, the concurrent, or constitutional majority. I call it the constitutional majority, because it is an essential element in every constitutional government,—be its form what it may. So great is the difference, politically speaking, between the two majorities, that they cannot be confounded, without leading to great and fatal errors; and yet the distinction between them has been so entirely overlooked, that when the term *majority* is used in political discussions, it is applied exclusively to designate the numerical,—as if there were no other. Until this distinction is recognized, and better understood, there will continue to be great

liability to error in properly constructing constitutional governments, especially of the popular form, and of preserving them when properly constructed. Until then, the latter will have a strong tendency to slide, first, into the government of the numerical majority, and, finally, into absolute government of some other form. To show that such must be the case, and at the same time to mark more strongly the difference between the two, in order to guard against the danger of overlooking it, I propose to consider the subject more at length.

The first and leading error which naturally arises from overlooking the distinction referred to, is, to confound the numerical majority with the people; and this so completely as to regard them as identical. This is a consequence that necessarily results from considering the numerical as the only majority. All admit, that a popular government, or democracy, is the government of the people; for the terms imply this. A perfect government of the kind would be one which would embrace the consent of every citizen or member of the community; but as this is impracticable, in the opinion of those who regard the numerical as the only majority, and who can perceive no other way by which the sense of the people can be taken,—they are compelled to adopt this as the only true basis of popular government, in contradistinction to governments of the aristocratical or monarchical form. Being thus constrained, they are, in the next place, forced to regard the numerical majority, as, in effect, the entire people; that is, the greater part as the whole; and

the government of the greater part as the government of the whole. It is thus the two come to be confounded, and a part made identical with the whole. And it is thus, also, that all the rights, powers, and immunities of the whole people come to be attributed to the numerical majority; and, among others, the supreme, sovereign authority of establishing and abolishing governments at pleasure.

This radical error, the consequence of confounding the two, and of regarding the numerical as the only majority, has contributed more than any other cause, to prevent the formation of popular constitutional governments,—and to destroy them even when they have been formed. It leads to the conclusion that, in their formation and establishment, nothing more is necessary than the right of suffrage,—and the allotment to each division of the community a representation in the government, in proportion to numbers. If the numerical majority were really the people; and if, to take its sense truly, were to take the sense of the people truly, a government so constituted would be a true and perfect model of a popular constitutional government; and every departure from it would detract from its excellence. But, as such is not the case,—as the numerical majority, instead of being the people, is only a portion of them,—such a government, instead of being a true and perfect model of the people's government, that is, a people self-governed, is but the government of a part, over a part,—the major over the minor portion.

But this misconception of the true elements of

constitutional government does not stop here. It leads to others equally false and fatal, in reference to the best means of preserving and perpetuating them, when, from some fortunate combination of circumstances, they are correctly formed. For they who fall into these errors regard the restrictions which organism imposes on the will of the numerical majority as restrictions on the will of the people, and, therefore, as not only useless, but wrongful and mischievous. And hence they endeavor to destroy organism, under the delusive hope of making government more democratic.

Such are some of the consequences of confounding the two, and of regarding the numerical as the only majority. And in this may be found the reason why so few popular governments have been properly constructed, and why, of these few, so small a number have proved durable. Such must continue to be the result, so long as these errors continue to be prevalent.

There is another error, of a kindred character, whose influence contributes much to the same results: I refer to the prevalent opinion, that a written constitution, containing suitable restrictions on the powers of government, is sufficient, of itself, without the aid of any organism,—except such as is necessary to separate its several departments, and render them independent of each other,—to counteract the tendency of the numerical majority to oppression and the abuse of power.

A written constitution certainly has many and considerable advantages; but it is a great mistake

to suppose, that the mere insertion of provisions to restrict and limit the powers of the government, without investing those for whose protection they are inserted with the means of enforcing their observance, will be sufficient to prevent the major and dominant party from abusing its powers. Being the party in possession of the government, they will, from the same constitution of man which makes government necessary to protect society, be in favor of the powers granted by the constitution, and opposed to the restrictions intended to limit them. As the major and dominant party, they will have no need of these restrictions for their protection. The ballot-box, of itself, would be ample protection to them. Needing no other, they would come, in time, to regard these limitations as unnecessary and improper restraints ;—and endeavor to elude them, with the view of increasing their power and influence.

The minor, or weaker party, on the contrary, would take the opposite direction ;—and regard them as essential to their protection against the dominant party. And, hence, they would endeavor to defend and enlarge the restrictions, and to limit and contract the powers. But where there are no means by which they could compel the major party to observe the restrictions, the only resort left them would be, a strict construction of the constitution, —that is, a construction which would confine these powers to the narrowest limits which the meaning of the words used in the grant would admit.

To this the major party would oppose a liberal

construction,—one which would give to the words of the grant the broadest meaning of which they were susceptible. It would then be construction against construction; the one to contract, and the other to enlarge the powers of the government to the utmost. But of what possible avail could the strict construction of the minor party be, against the liberal interpretation of the major, when the one would have all the powers of the government to carry its construction into effect,—and the other be deprived of all means of enforcing its construction? In a contest so unequal, the result would not be doubtful. The party in favor of the restrictions would be overpowered. At first, they might command some respect, and do something to stay the march of encroachment; but they would, in the progress of the contest, be regarded as mere abstractionists; and, indeed, deservedly, if they should indulge the folly of supposing that the party in possession of the ballot-box and the physical force of the country, could be successfully resisted by an appeal to reason, truth, justice, or the obligations imposed by the constitution. For when these, of themselves, shall exert sufficient influence to stay the hand of power, then government will be no longer necessary to protect society, nor constitutions needed to prevent government from abusing its powers. The end of the contest would be the subversion of the constitution, either by the undermining process of construction,—where its meaning would admit of possible doubt,—or by substituting in practice what is called party-usage, in place of its provisions;—

or, finally, when no other contrivance would subserve the purpose, by openly and boldly setting them aside. By the one or the other, the restrictions would ultimately be annulled, and the government be converted into one of unlimited powers.

Nor would the division of government into separate, and, as it regards each other, independent departments, prevent this result. Such a division may do much to facilitate its operations, and to secure to its administration greater caution and deliberation; but as each and all the departments,—and, of course, the entire government,—would be under the control of the numerical majority, it is too clear to require explanation, that a mere distribution of its powers among its agents or representatives, could do little or nothing to counteract its tendency to oppression and abuse of power. To effect this, it would be necessary to go one step further, and make the several departments the organs of the distinct interests or portions of the community; and to clothe each with a negative on the others. But the effect of this would be to change the government from the numerical into the concurrent majority.

Having now explained the reasons why it is so difficult to form and preserve popular constitutional government, so long as the distinction between the two majorities is overlooked, and the opinion prevails that a written constitution, with suitable restrictions and a proper division of its powers, is sufficient to counteract the tendency of the numerical

majority to the abuse of its power,—I shall next proceed to explain, more fully, why the concurrent majority is an indispensable element in forming constitutional governments; and why the numerical majority, of itself, must, in all cases, make governments absolute.

The necessary consequence of taking the sense of the community by the concurrent majority is, as has been explained, to give to each interest or portion of the community a negative on the others. It is this mutual negative among its various conflicting interests, which invests each with the power of protecting itself;—and places the rights and safety of each, where only they can be securely placed, under its own guardianship. Without this there can be no systematic, peaceful, or effective resistance to the natural tendency of each to come into conflict with the others: and without this there can be no constitution. It is this negative power,—the power of preventing or arresting the action of the government,—be it called by what term it may,—veto, interposition, nullification, check, or balance of power, —which, in fact, forms the constitution. They are all but different names for the negative power. In all its forms, and under all its names, it results from the concurrent majority. Without this there can be no negative; and, without a negative, no constitution. The assertion is true in reference to all constitutional governments, be their forms what they may. It is, indeed, the negative power which makes the constitution,—and the positive which makes the government. The one is the power of

acting;—and the other the power of preventing or arresting action. The two, combined, make constitutional governments.

But, as there can be no constitution without the negative power, and no negative power without the concurrent majority;—it follows, necessarily, that where the numerical majority has the sole control of the government, there can be no constitution; as constitution implies limitation or restriction,—and, of course, is inconsistent with the idea of sole or exclusive power. And hence, the numerical, unmixed with the concurrent majority, necessarily forms, in all cases, absolute government.

It is, indeed, the single, or *one power*, which excludes the negative, and constitutes absolute government; and not the *number* in whom the power is vested. The numerical majority is as truly a *single power*, and excludes the negative as completely as the absolute government of one, or of the few. The former is as much the absolute government of the democratic, or popular form, as the latter of the monarchical or aristocratical. It has, accordingly, in common with them, the same tendency to oppression and abuse of power.

Constitutional governments, of whatever form, are, indeed, much more similar to each other, in their structure and character, than they are, respectively, to the absolute governments, even of their own class. All constitutional governments, of whatever class they may be, take the sense of the community by its parts,—each through its appropriate organ; and regard the sense of all its parts, as the sense of

the whole. They all rest on the right of suffrage, and the responsibility of rulers, directly or indirectly. On the contrary, all absolute governments, of whatever form, concentrate power in one uncontrolled and irresponsible individual or body, whose will is regarded as the sense of the community. And, hence, the great and broad distinction between governments is,—not that of the one, the few, or the many,—but of the constitutional and the absolute.

From this there results another distinction, which, although secondary in its character, very strongly marks the difference between these forms of government. I refer to their respective conservative principle;—that is, the principle by which they are upheld and preserved. This principle, in constitutional governments, is *compromise;*—and in absolute governments, is *force;*—as will be next explained.

It has been already shown, that the same constitution of man which leads those who govern to oppress the governed,—if not prevented,—will, with equal force and certainty, lead the latter to resist oppression, when possessed of the means of doing so peaceably and successfully. But absolute governments, of all forms, exclude all other means of resistance to their authority, than that of force; and, of course, leave no other alternative to the governed, but to acquiesce in oppression, however great it may be, or to resort to force to put down the government. But the dread of such a resort must necessarily lead the government to prepare to

meet force in order to protect itself; and hence, of necessity, force becomes the conservative principle of all such governments.

On the contrary, the government of the concurrent majority, where the organism is perfect, excludes the possibility of oppression, by giving to each interest, or portion, or order,—where there are established classes,—the means of protecting itself, by its negative, against all measures calculated to advance the peculiar interests of others at its expense. Its effect, then, is, to cause the different interests, portions, or orders,—as the case may be,—to desist from attempting to adopt any measure calculated to promote the prosperity of one, or more, by sacrificing that of others; and thus to force them to unite in such measures only as would promote the prosperity of all, as the only means to prevent the suspension of the action of the government;—and, thereby, to avoid anarchy, the greatest of all evils. It is by means of such authorized and effectual resistance, that oppression is prevented, and the necessity of resorting to force superseded, in governments of the concurrent majority;—and, hence, compromise, instead of force, becomes their conservative principle.

It would, perhaps, be more strictly correct to trace the conservative principle of constitutional governments to the necessity which compels the different interests, or portions, or orders, to compromise,—as the only way to promote their respective prosperity, and to avoid anarchy,—rather than to the compromise itself. No necessity can be more

urgent and imperious, than that of avoiding anarchy. It is the same as that which makes government indispensable to preserve society; and is not less imperative than that which compels obedience to superior force. Traced to this source, the voice of a people,—uttered under the necessity of avoiding the greatest of calamities, through the organs of a government so constructed as to suppress the expression of all partial and selfish interests, and to give a full and faithful utterance to the sense of the whole community, in reference to its common welfare,—may, without impiety, be called *the voice of God.* To call any other so, would be impious.

In stating that force is the conservative principle of absolute, and compromise of constitutional governments, I have assumed both to be perfect in their kind; but not without bearing in mind, that few or none, in fact, have ever been so absolute as not to be under some restraint, and none so perfectly organized as to represent fully and perfectly the voice of the whole community. Such being the case, all must, in practice, depart more or less from the principles by which they are respectively upheld and preserved; and depend more or less for support, on force, or compromise, as the absolute or the constitutional form predominates in their respective organizations.

Nor, in stating that absolute governments exclude all other means of resistance to its authority than that of force, have I overlooked the case of governments of the numerical majority, which form, apparently, an exception. It is true that, in such

governments, the minor and subject party, for the time, have the right to oppose and resist the major and dominant party, for the time, through the ballot-box; and may turn them out, and take their place, if they can obtain a majority of votes. But, it is no less true, that this would be a mere change in the relations of the two parties. The minor and subject party would become the major and dominant party, with the same absolute authority and tendency to abuse power; and the major and dominant party would become the minor and subject party, with the same right to resist through the ballot-box; and, if successful, again to change relations, with like effect. But such a state of things must necessarily be temporary. The conflict between the two parties must be transferred, sooner or later, from an appeal to the ballot-box to an appeal to force;—as I shall next proceed to explain.

The conflict between the two parties, in the government of the numerical majority, tends necessarily to settle down into a struggle for the honors and emoluments of the government; and each, in order to obtain an object so ardently desired, will, in the process of the struggle, resort to whatever measure may seem best calculated to effect this purpose. The adoption, by the one, of any measure, however objectionable, which might give it an advantage, would compel the other to follow its example. In such case, it would be indispensable to success to avoid division and keep united;—and hence, from a necessity inherent in the nature of such governments, each party must be alternately forced, in order to insure

victory, to resort to measures to concentrate the control over its movements in fewer and fewer hands, as the struggle became more and more violent. This, in process of time, must lead to party organization, and party caucuses and discipline; and these, to the conversion of the honors and emoluments of the government into means of rewarding partisan services, in order to secure the fidelity and increase the zeal of the members of the party. The effect of the whole combined, even in the earlier stages of the process, when they exert the least pernicious influence, would be to place the control of the two parties in the hands of their respective majorities; and the government itself, virtually, under the control of the majority of the dominant party, for the time, instead of the majority of the whole community;—where the theory of this form of government vests it. Thus, in the very first stage of the process, the government becomes the government of a minority instead of a majority;—a minority, usually, and under the most favorable circumstances, of not much more than one-fourth of the whole community.

But the process, as regards the concentration of power, would not stop at this stage. The government would gradually pass from the hands of the majority of the party into those of its leaders; as the struggle became more intense, and the honors and emoluments of the government the all-absorbing objects. At this stage, principles and policy would lose all influence in the elections; and cunning, falsehood, deception, slander, fraud, and gross appeals to the appetites of the lowest and most worth-

less portions of the community, would take the place of sound reason and wise debate. After these have thoroughly debased and corrupted the community, and all the arts and devices of party have been exhausted, the government would vibrate between the two factions (for such will parties have become) at each successive election. Neither would be able to retain power beyond some fixed term; for those seeking office and patronage would become too numerous to be rewarded by the offices and patronage at the disposal of the government; and these being the sole objects of pursuit, the disappointed would, at the next succeeding election, throw their weight into the opposite scale, in the hope of better success at the next turn of the wheel. These vibrations would continue until confusion, corruption, disorder, and anarchy, would lead to an appeal to force;—to be followed by a revolution in the form of the government. Such must be the end of the government of the numerical majority; and such, in brief, the process through which it must pass, in the regular course of events, before it can reach it.

This transition would be more or less rapid, according to circumstances. The more numerous the population, the more extensive the country, the more diversified the climate, productions, pursuits and character of the people, the more wealthy, refined, and artificial their condition,—and the greater the amount of revenues and disbursements,—the more unsuited would the community be to such a government, and the more rapid would be the passage.

On the other hand, it might be slow in its progress amongst small communities, during the early stages of their existence, with inconsiderable revenues and disbursements, and a population of simple habits; provided the people are sufficiently intelligent to exercise properly, the right of suffrage, and sufficiently conversant with the rules necessary to govern the deliberations of legislative bodies. It is, perhaps, the only form of popular government suited to a people, while they remain in such a condition. Any other would be not only too complex and cumbersome, but unnecessary to guard against oppression, where the motive to use power for that purpose would be so feeble. And hence, colonies, from countries having constitutional governments, if left to themselves, usually adopt governments based on the numerical majority. But as population increases, wealth accumulates, and, above all, the revenues and expenditures become large,—governments of this form must become less and less suited to the condition of society; until, if not in the mean time changed into governments of the concurrent majority, they must end in an appeal to force, to be followed by a radical change in its structure and character; and, most probably, into monarchy in its absolute form,—as will be next explained.

Such, indeed, is the repugnance between popular governments and force,—or, to be more specific,—military power,—that the almost necessary consequence of a resort to force, by such governments, in order to maintain their authority, is, not only a change of their form, but a change into the most opposite,

—that of absolute monarchy. The two are the opposites of each other. From the nature of popular governments, the control of its powers is vested in the many; while military power, to be efficient, must be vested in a single individual. When, then, the two parties, in governments of the numerical majority, resort to force, in their struggle for supremacy, he who commands the successful party will have the control of the government itself. And, hence, in such contests, the party which may prevail, will usually find, in the commander of its forces, a master, under whom the great body of the community will be glad to find protection against the incessant agitation and violent struggles of two corrupt factions, —looking only to power as the means of securing to themselves the honors and emoluments of the government.

From the same cause, there is a like tendency in aristocratical to terminate in absolute governments of the monarchical form; but by no means as strong, because there is less repugnance between military power and aristocratical, than between it and democratical governments.

A broader position may, indeed, be taken; viz., that there is a tendency, in constitutional governments of every form, to degenerate into their respective absolute forms; and, in all absolute governments, into that of the monarchical form. But the tendency is much stronger in constitutional governments of the democratic form to degenerate into their respective absolute forms, than in either of the others; because, among other reasons, the distinc-

tion between the constitutional and absolute forms of aristocratical and monarchical governments, is far more strongly marked than in democratic governments. The effect of this is, to make the different orders or classes in an aristocracy, or monarchy, far more jealous and watchful of encroachment on their respective rights; and more resolute and persevering in resisting attempts to concentrate power in any one class or order. On the contrary, the line between the two forms, in popular governments, is so imperfectly understood, that honest and sincere friends of the constitutional form not unfrequently, instead of jealously watching and arresting their tendency to degenerate into their absolute forms, not only regard it with approbation, but employ all their powers to add to its strength and to increase its impetus, in the vain hope of making the government more perfect and popular. The numerical majority, perhaps, should usually be one of the elements of a constitutional democracy; but to make it the sole element, in order to perfect the constitution and make the government more popular, is one of the greatest and most fatal of political errors.

Among the other advantages which governments of the concurrent have over those of the numerical majority,—and which strongly illustrates their more popular character, is,—that they admit, with safety, a much greater extension of the right of suffrage. It may be safely extended in such governments to universal suffrage: that is,—to every male citizen of mature age, with few ordinary ex-

ceptions; but it cannot be so far extended in those of the numerical majority, without placing them ultimately under the control of the more ignorant and dependent portions of the community. For, as the community becomes populous, wealthy, refined, and highly civilized, the difference between the rich and the poor will become more strongly marked; and the number of the ignorant and dependent greater in proportion to the rest of the community. With the increase of this difference, the tendency to conflict between them will become stronger; and, as the poor and dependent become more numerous in proportion, there will be, in governments of the numerical majority, no want of leaders among the wealthy and ambitious, to excite and direct them in their efforts to obtain the control.

The case is different in governments of the concurrent majority. There, mere numbers have not the absolute control; and the wealthy and intelligent being identified in interest with the poor and ignorant of their respective portions or interests of the community, become their leaders and protectors. And hence, as the latter would have neither hope nor inducement to rally the former in order to obtain the control, the right of suffrage, under such a government, may be safely enlarged to the extent stated, without incurring the hazard to which such enlargement would expose governments of the numerical majority.

In another particular, governments of the concurrent majority have greatly the advantage. I

allude to the difference in their respective tendency, in reference to dividing or uniting the community. That of the concurrent, as has been shown, is to unite the community, let its interests be ever so diversified or opposed; while that of the numerical is to divide it into two conflicting portions, let its interests be, naturally, ever so united and identified.

That the numerical majority will divide the community, let it be ever so homogeneous, into two great parties, which will be engaged in perpetual struggles to obtain the control of the government, has already been established. The great importance of the object at stake, must necessarily form strong party attachments and party antipathies;—attachments on the part of the members of each to their respective parties, through whose efforts they hope to accomplish an object dear to all; and antipathies to the opposite party, as presenting the only obstacle to success.

In order to have a just conception of their force, it must be taken into consideration, that the object to be won or lost appeals to the strongest passions of the human heart,—avarice, ambition, and rivalry. It is not then wonderful, that a form of government, which periodically stakes all its honors and emoluments, as prizes to be contended for, should divide the community into two great hostile parties; or that party attachments, in the progress of the strife, should become so strong among the members of each respectively, as to absorb almost every feeling of our nature, both social and individual; or that

their mutual antipathies should be carried to such an excess as to destroy, almost entirely, all sympathy between them, and to substitute in its place the strongest aversion. Nor is it surprising, that under their joint influence, the community should cease to be the common centre of attachment, or that each party should find that centre only in itself. It is thus, that, in such governments, devotion to party becomes stronger than devotion to country;—the promotion of the interests of party more important than the promotion of the common good of the whole, and its triumph and ascendency, objects of far greater solicitude, than the safety and prosperity of the community. It is thus, also, that the numerical majority, by regarding the community as a unit, and having, as such, the same interests throughout all its parts, must, by its necessary operation, divide it into two hostile parts, waging, under the forms of law, incessant hostilities against each other.

The concurrent majority, on the other hand, tends to unite the most opposite and conflicting interests, and to blend the whole in one common attachment to the country. By giving to each interest, or portion, the power of self-protection, all strife and struggle between them for ascendency, is prevented; and, thereby, not only every feeling calculated to weaken the attachment to the whole is suppressed, but the individual and the social feelings are made to unite in one common devotion to country. Each sees and feels that it can best promote its own prosperity by conciliating the good-will, and promoting the prosperity of the others.

And hence, there will be diffused throughout the whole community kind feelings between its different portions; and, instead of antipathy, a rivalry amongst them to promote the interests of each other, as far as this can be done consistently with the interest of all. Under the combined influence of these causes, the interests of each would be merged in the common interests of the whole; and thus, the community would become a unit, by becoming the common centre of attachment of all its parts. And hence, instead of faction, strife, and struggle for party ascendency, there would be patriotism, nationality, harmony, and a struggle only for supremacy in promoting the common good of the whole.

But the difference in their operation, in this respect, would not end here. Its effects would be as great in a moral, as I have attempted to show they would be in a political point of view. Indeed, public and private morals are so nearly allied, that it would be difficult for it to be otherwise. That which corrupts and debases the community, politically, must also corrupt and debase it morally. The same cause, which, in governments of the numerical majority, gives to party attachments and antipathies such force, as to place party triumph and ascendency above the safety and prosperity of the community, will just as certainly give them sufficient force to overpower all regard for truth, justice, sincerity, and moral obligations of every description. It is, accordingly, found that, in the violent strifes between parties for the high and glittering prize of governmental honors and emolu-

ments,—falsehood, injustice, fraud, artifice, slander, and breach of faith, are freely resorted to, as legitimate weapons;—followed by all their corrupting and debasing influences.

In the government of the concurrent majority, on the contrary, the same cause which prevents such strife, as the means of obtaining power, and which makes it the interest of each portion to conciliate and promote the interests of the others, would exert a powerful influence towards purifying and elevating the character of the government and the people, morally, as well as politically. The means of acquiring power,—or, more correctly, influence,—in such governments, would be the reverse. Instead of the vices, by which it is acquired in that of the numerical majority, the opposite virtues—truth, justice, integrity, fidelity, and all others, by which respect and confidence are inspired, would be the most certain and effectual means of acquiring it.

Nor would the good effects resulting thence be confined to those who take an active part in political affairs. They would extend to the whole community. For of all the causes which contribute to form the character of a people, those by which power, influence, and standing in the government are most certainly and readily obtained, are, by far, the most powerful. These are the objects most eagerly sought of all others by the talented and aspiring; and the possession of which commands the greatest respect and admiration. But, just in proportion to this respect and admiration will be

their appreciation by those, whose energy, intellect, and position in society, are calculated to exert the greatest influence in forming the character of a people. If knowledge, wisdom, patriotism, and virtue, be the most certain means of acquiring them, they will be most highly appreciated and assiduously cultivated; and this would cause them to become prominent traits in the character of the people. But if, on the contrary, cunning, fraud, treachery, and party devotion be the most certain, they will be the most highly prized, and become marked features in their character. So powerful, indeed, is the operation of the concurrent majority, in this respect, that, if it were possible for a corrupt and degenerate community to establish and maintain a well-organized government of the kind, it would of itself purify and regenerate them; while, on the other hand, a government based wholly on the numerical majority, would just as certainly corrupt and debase the most patriotic and virtuous people. So great is their difference in this respect, that, just as the one or the other element predominates in the construction of any government, in the same proportion will the character of the government and the people rise or sink in the scale of patriotism and virtue. Neither religion nor education can counteract the strong tendency of the numerical majority to corrupt and debase the people.

If the two be compared, in reference to the ends for which government is ordained, the superiority of the government of the concurrent majority will not be less striking. These, as has been stated,

are twofold; to protect, and to perfect society. But to preserve society, it is necessary to guard the community against injustice, violence, and anarchy within, and against attacks from without. If it fail in either, it would fail in the primary end of government, and would not deserve the name.

To perfect society, it is necessary to develope the faculties, intellectual and moral, with which man is endowed. But the main spring to their development, and, through this, to progress, improvement and civilization, with all their blessings, is the desire of individuals to better their condition. For, this purpose, liberty and security are indispensable. Liberty leaves each free to pursue the course he may deem best to promote his interest and happiness, as far as it may be compatible with the primary end for which government is ordained;—while security gives assurance to each, that he shall not be deprived of the fruits of his exertions to better his condition. These combined, give to this desire the strongest impulse of which it is susceptible. For, to extend liberty beyond the limits assigned, would be to weaken the government and to render it incompetent to fulfil its primary end,—the protection of society against dangers, internal and external. The effect of this would be, insecurity; and, of insecurity,—to weaken the impulse of individuals to better their condition, and thereby retard progress and improvement. On the other hand, to extend the powers of the government, so as to contract the sphere assigned to liberty, would have the same effect, by disabling individuals in their efforts to better their condition.

Herein is to be found the principle which assigns to power and liberty their proper spheres, and reconciles each to the other under all circumstances. For, if power be necessary to secure to liberty the fruits of its exertions, liberty, in turn, repays power with interest, by increased population, wealth, and other advantages, which progress and improvement bestow on the community. By thus assigning to each its appropriate sphere, all conflicts between them cease; and each is made to co-operate with and assist the other, in fulfilling the great ends for which government is ordained.

But the principle, applied to different communities, will assign to them different limits. It will assign a larger sphere to power and a more contracted one to liberty, or the reverse, according to circumstances. To the former, there must ever be allotted, under all circumstances, a sphere sufficiently large to protect the community against danger from without and violence and anarchy within. The residuum belongs to liberty. More cannot be safely or rightly allotted to it.

But some communities require a far greater amount of power than others to protect them against anarchy and external dangers; and, of course, the sphere of liberty in such, must be proportionally contracted. The causes calculated to enlarge the one and contract the other, are numerous and various. Some are physical;—such as open and exposed frontiers, surrounded by powerful and hostile neighbors. Others are moral;—such as the different degrees of intelligence, patriotism, and vir-

tue among the mass of the community, and their experience and proficiency in the art of self-government. Of these, the moral are, by far, the most influential. A community may possess all the necessary moral qualifications, in so high a degree, as to be capable of self-government under the most adverse circumstances; while, on the other hand, another may be so sunk in ignorance and vice, as to be incapable of forming a conception of liberty, or of living, even when most favored by circumstances, under any other than an absolute and despotic government.

The principle, in all communities, according to these numerous and various causes, assigns to power and liberty their proper spheres. To allow to liberty, in any case, a sphere of action more extended than this assigns, would lead to anarchy; and this, probably, in the end, to a contraction instead of an enlargement of its sphere. Liberty, then, when forced on a people unfit for it, would, instead of a blessing, be a curse; as it would, in its reaction, lead directly to anarchy,—the greatest of all curses. No people, indeed, can long enjoy more liberty than that to which their situation and advanced intelligence and morals fairly entitle them. If more than this be allowed, they must soon fall into confusion and disorder,—to be followed, if not by anarchy and despotism, by a change to a form of government more simple and absolute; and, therefore, better suited to their condition. And hence, although it may be true, that a people may not have as much liberty as they are fairly entitled

to, and are capable of enjoying,—yet the reverse is unquestionably true,—that no people can long possess more than they are fairly entitled to.

Liberty, indeed, though among the greatest of blessings, is not so great as that of protection; inasmuch, as the end of the former is the progress and improvement of the race,—while that of the latter is its preservation and perpetuation. And hence, when the two come into conflict, liberty must, and ever ought, to yield to protection; as the existence of the race is of greater moment than its improvement.

It follows, from what has been stated, that it is a great and dangerous error to suppose that all people are equally entitled to liberty. It is a reward to be earned, not a blessing to be gratuitously lavished on all alike;—a reward reserved for the intelligent, the patriotic, the virtuous and deserving;—and not a boon to be bestowed on a people too ignorant, degraded and vicious, to be capable either of appreciating or of enjoying it. Nor is it any disparagement to liberty, that such is, and ought to be the case. On the contrary, its greatest praise,—its proudest distinction is, that an all-wise Providence has reserved it, as the noblest and highest reward for the development of our faculties, moral and intellectual. A reward more appropriate than liberty could not be conferred on the deserving;—nor a punishment inflicted on the undeserving more just, than to be subject to lawless and despotic rule. This dispensation seems to be the result of some fixed law;—and every effort to disturb or defeat it,

by attempting to elevate a people in the scale of liberty, above the point to which they are entitled to rise, must ever prove abortive, and end in disappointment. The progress of a people rising from a lower to a higher point in the scale of liberty, is necessarily slow;—and by attempting to precipitate, we either retard, or permanently defeat it.

There is another error, not less great and dangerous, usually associated with the one which has just been considered. I refer to the opinion, that liberty and equality are so intimately united, that liberty cannot be perfect without perfect equality.

That they are united to a certain extent,—and that equality of citizens, in the eyes of the law, is essential to liberty in a popular government, is conceded. But to go further, and make equality of *condition* essential to liberty, would be to destroy both liberty and progress. The reason is, that inequality of condition, while it is a necessary consequence of liberty, is, at the same time, indispensable to progress. In order to understand why this is so, it is necessary to bear in mind, that the main spring to progress is, the desire of individuals to better their condition; and that the strongest impulse which can be given to it is, to leave individuals free to exert themselves in the manner they may deem best for that purpose, as far at least as it can be done consistently with the ends for which government is ordained,—and to secure to all the fruits of their exertions. Now, as individuals differ greatly from each other, in intelligence, sagacity, energy, perseverance, skill, habits of industry and economy,

physical power, position and opportunity,—the necessary effect of leaving all free to exert themselves to better their condition, must be a corresponding inequality between those who may possess these qualities and advantages in a high degree, and those who may be deficient in them. The only means by which this result can be prevented are, either to impose such restrictions on the exertions of those who may possess them in a high degree, as will place them on a level with those who do not; or to deprive them of the fruits of their exertions. But to impose such restrictions on them would be destructive of liberty,—while, to deprive them of the fruits of their exertions, would be to destroy the desire of bettering their condition. It is, indeed, this inequality of condition between the front and rear ranks, in the march of progress, which gives so strong an impulse to the former to maintain their position, and to the latter to press forward into their files. This gives to progress its greatest impulse. To force the front rank back to the rear, or attempt to push forward the rear into line with the front, by the interposition of the government, would put an end to the impulse, and effectually arrest the march of progress.

These great and dangerous errors have their origin in the prevalent opinion that all men are born free and equal;—than which nothing can be more unfounded and false. It rests upon the assumption of a fact, which is contrary to universal observation, in whatever light it may be regarded. It is, indeed, difficult to explain how an opinion so destitute of

all sound reason, ever could have been so extensively entertained, unless we regard it as being confounded with another, which has some semblance of truth;—but which, when properly understood, is not less false and dangerous. I refer to the assertion, that all men are equal in the state of nature; meaning, by a state of nature, a state of individuality, supposed to have existed prior to the social and political state; and in which men lived apart and independent of each other. If such a state ever did exist, all men would have been, indeed, free and equal in it; that is, free to do as they pleased, and exempt from the authority or control of others—as, by supposition, it existed anterior to society and government. But such a state is purely hypothetical. It never did, nor can exist; as it is inconsistent with the preservation and perpetuation of the race. It is, therefore, a great misnomer to call it *the state of nature.* Instead of being the natural state of man, it is, of all conceivable states, the most opposed to his nature—most repugnant to his feelings, and most incompatible with his wants. His natural state is, the social and political—the one for which his Creator made him, and the only one in which he can preserve and perfect his race. As, then, there never was such a state as the, so called, state of nature, and never can be, it follows, that men, instead of being born in it, are born in the social and political state; and of course, instead of being born free and equal, are born subject, not only to parental authority, but to the laws and institutions of the country where born, and under whose

protection they draw their first breath. With these remarks, I return from this digression, to resume the thread of the discourse.

It follows, from all that has been said, that the more perfectly a government combines power and liberty,—that is, the greater its power and the more enlarged and secure the liberty of individuals, the more perfectly it fulfils the ends for which government is ordained. To show, then, that the government of the concurrent majority is better calculated to fulfil them than that of the numerical, it is only necessary to explain why the former is better suited to combine a higher degree of power and a wider scope of liberty than the latter. I shall begin with the former.

The concurrent majority, then, is better suited to enlarge and secure the bounds of liberty, because it is better suited to prevent government from passing beyond its proper limits, and to restrict it to its primary end,—the protection of the community. But in doing this, it leaves, necessarily, all beyond it open and free to individual exertions; and thus enlarges and secures the sphere of liberty to the greatest extent which the condition of the community will admit, as has been explained. The tendency of government to pass beyond its proper limits is what exposes liberty to danger, and renders it insecure; and it is the strong counteraction of governments of the concurrent majority to this tendency which makes them so favorable to liberty. On the contrary, those of the numerical, instead of opposing and counteracting this tendency, add to it

increased strength, in consequence of the violent party struggles incident to them, as has been fully explained. And hence their encroachments on liberty, and the danger to which it is exposed under such governments.

So great, indeed, is the difference between the two in this respect, that liberty is little more than a name under all governments of the absolute form, including that of the numerical majority; and can only have a secure and durable existence under those of the concurrent or constitutional form. The latter, by giving to each portion of the community which may be unequally affected by its action, a negative on the others, prevents all partial or local legislation, and restricts its action to such measures as are designed for the protection and the good of the whole. In doing this, it secures, at the same time, the rights and liberty of the people, regarded individually; as each portion consists of those who, whatever may be the diversity of interests among themselves, have the same interest in reference to the action of the government.

Such being the case, the interest of each individual may be safely confided to the majority, or voice of his portion, against that of all others, and, of course, the government itself. It is only through an organism which vests each with a negative, in some one form or another, that those who have like interests in preventing the government from passing beyond its proper sphere, and encroaching on the rights and liberty of individuals, can co-operate peaceably and effectually in resisting the encroach-

ments of power, and thereby preserve their rights and liberty. Individual resistance is too feeble, and the difficulty of concert and co-operation too great, unaided by such an organism, to oppose, successfully, the organized power of government, with all the means of the community at its disposal; especially in populous countries of great extent, where concert and co-operation are almost impossible. Even when the oppression of the government comes to be too great to be borne, and force is resorted to in order to overthrow it, the result is rarely ever followed by the establishment of liberty. The force sufficient to overthrow an oppressive government is usually sufficient to establish one equally, or more, oppressive in its place. And hence, in no governments, except those that rest on the principle of the concurrent or constitutional majority, can the people guard their liberty against power; and hence, also, when lost, the great difficulty and uncertainty of regaining it by force.

It may be further affirmed, that, being more favorable to the enlargement and security of liberty, governments of the concurrent, must necessarily be more favorable to progress, development, improvement, and civilization,—and, of course, to the increase of power which results from, and depends on these, than those of the numerical majority. That it is liberty which gives to them their greatest impulse, has already been shown; and it now remains to show, that these, in turn, contribute greatly to the increase of power.

In the earlier stages of society, numbers and in-

dividual prowess constituted the principal elements of power. In a more advanced stage, when communities had passed from the barbarous to the civilized state, discipline, strategy, weapons of increased power, and money,—as the means of meeting increased expense,—became additional and important elements. In this stage, the effects of progress and improvement on the increase of power, began to be disclosed; but still numbers and personal prowess were sufficient, for a long period, to enable barbarous nations to contend successfully with the civilized,—and, in the end, to overpower them,—as the pages of history abundantly testify. But a more advanced progress, with its numerous inventions and improvements, has furnished new and far more powerful and destructive implements of offence and defence, and greatly increased the intelligence and wealth, necessary to engage the skill and meet the increased expense required for their construction and application to purposes of war. The discovery of gunpowder, and the use of steam as an impelling force, and their application to military purposes, have for ever settled the question of ascendency between civilized and barbarous communities, in favor of the former. Indeed, these, with other improvements, belonging to the present state of progress, have given to communities the most advanced, a superiority over those the least so, almost as great as that of the latter over the brute creation. And among the civilized, the same causes have decided the question of superiority, where other circumstances are nearly equal, in favor of those whose governments have given the

greatest impulse to development, progress, and improvement; that is, to those whose liberty is the largest and best secured. Among these, England and the United States afford striking examples, not only of the effects of liberty in increasing power, but of the more perfect adaptation of governments founded on the principle of the concurrent, or constitutional majority, to enlarge and secure liberty. They are both governments of this description, as will be shown hereafter.

But in estimating the power of a community, moral, as well as physical causes, must be taken into the calculation; and in estimating the effects of liberty on power, it must not be overlooked, that it is, in itself, an important agent in augmenting the force of moral, as well as of physical power. It bestows on a people elevation, self-reliance, energy, and enthusiasm; and these combined, give to physical power a vastly augmented and almost irresistible impetus.

These, however, are not the only elements of moral power. There are others, and among them harmony, unanimity, devotion to country, and a disposition to elevate to places of trust and power, those who are distinguished for wisdom and experience. These, when the occasion requires it, will, without compulsion, and from their very nature, unite and put forth the entire force of the community in the most efficient manner, without hazard to its institutions or its liberty.

All these causes combined, give to a community its maximum of power. Either of them, without

the other, would leave it comparatively feeble. But it cannot be necessary, after what has been stated, to enter into any further explanation or argument in order to establish the superiority of governments of the concurrent majority over the numerical, in developing the great elements of moral power. So vast is this superiority, that the one, by its operation, necessarily leads to their development, while the other as necessarily prevents it,—as has been fully shown.

Such are the many and striking advantages of the concurrent over the numerical majority. Against the former but two objections can be made. The one is, that it is difficult of construction, which has already been sufficiently noticed; and the other, that it would be impracticable to obtain the concurrence of conflicting interests, where they were numerous and diversified; or, if not, that the process for this purpose, would be too tardy to meet, with sufficient promptness, the many and dangerous emergencies, to which all communities are exposed. This objection is plausible; and deserves a fuller notice than it has yet received.

The diversity of opinion is usually so great, on almost all questions of policy, that it is not surprising, on a slight view of the subject, it should be thought impracticable to bring the various conflicting interests of a community to unite on any one line of policy;—or, that a government, founded on such a principle, would be too slow in its movements and too weak in its foundation to succeed in practice. But, plausible as it may seem at the first

glance, a more deliberate view will show, that this opinion is erroneous. It is true, that, when there is no urgent necessity, it is difficult to bring those who differ, to agree on any one line of action. Each will naturally insist on taking the course he may think best;—and, from pride of opinion, will be unwilling to yield to others. But the case is different when there is an urgent necessity to unite on some common course of action; as reason and experience both prove. When something *must* be done,—and when it can be done only by the united consent of all,—the necessity of the case will force to a compromise;—be the cause of that necessity what it may. On all questions of acting, necessity, where it exists, is the overruling motive; and where, in such cases, compromise among the parties is an indispensable condition to acting, it exerts an overruling influence in predisposing them to acquiesce in some one opinion or course of action. Experience furnishes many examples in confirmation of this important truth. Among these, the trial by jury is the most familiar, and on that account, will be selected for illustration.

In these, twelve individuals, selected without discrimination, must unanimously concur in opinion,—under the obligations of an oath to find a true verdict, according to law and evidence; and this, too, not unfrequently under such great difficulty and doubt, that the ablest and most experienced judges and advocates differ in opinion, after careful examination. And yet, as impracticable as this mode of trial would seem to a superficial observer,

it is found, in practice, not only to succeed, but to be the safest, the wisest and the best that human ingenuity has ever devised. When closely investigated, the cause will be found in the necessity, under which the jury is placed, to agree unanimously, in order to find a verdict. This necessity acts as the predisposing cause of concurrence in some common opinion; and with such efficacy, that a jury rarely fails to find a verdict.

Under its potent influence, the jurors take their seats with the disposition to give a fair and impartial hearing to the arguments on both sides,—meet together in the jury-room,—not as disputants, but calmly to hear the opinions of each other, and to compare and weigh the arguments on which they are founded;—and, finally, to adopt that which, on the whole, is thought to be true. Under the influence of this *disposition to harmonize*, one after another falls into the same opinion, until unanimity is obtained. Hence its practicability;—and hence, also, its peculiar excellence. Nothing, indeed, can be more favorable to the success of truth and justice, than this predisposing influence caused by the necessity of being unanimous. It is so much so, as to compensate for the defect of legal knowledge, and a high degree of intelligence on the part of those who usually compose juries. If the necessity of unanimity were dispensed with, and the finding of a jury made to depend on a bare majority, jury-trial, instead of being one of the greatest improvements in the judicial department of government, would be one of the greatest evils that could be in-

flicted on the community. It would be, in such case, the conduit through which all the factious feelings of the day would enter and contaminate justice at its source.

But the same cause would act with still greater force in predisposing the various interests of the community to agree in a well organized government, founded on the concurrent majority. The necessity for unanimity, in order to keep the government in motion, would be far more urgent, and would act under circumstances still more favorable to secure it. It would be superfluous, after what has been stated, to add other reasons in order to show that no necessity, physical or moral, can be more imperious than that of government. It is so much so that, to suspend its action altogether, even for an inconsiderable period, would subject the community to convulsions and anarchy. But in governments of the concurrent majority such fatal consequences can only be avoided by the unanimous concurrence or acquiescence of the various portions of the community. Such is the imperious character of the necessity which impels to compromise under governments of this description.

But to have a just conception of the overpowering influence it would exert, the circumstances under which it would act must be taken into consideration. These will be found, on comparison, much more favorable than those under which juries act. In the latter case there is nothing besides the necessity of unanimity in finding a verdict, and the inconvenience to which they might be subjected in the

event of division, to induce juries to agree, except the love of truth and justice, which, when not counteracted by some improper motive or bias, more or less influences all, not excepting the most depraved. In the case of governments of the concurrent majority, there is, besides these, the love of country, than which, if not counteracted by the unequal and oppressive action of government, or other causes, few motives exert a greater sway. It comprehends, indeed, within itself, a large portion both of our individual and social feelings; and, hence, its almost boundless control when left free to act. But the government of the concurrent majority leaves it free, by preventing abuse and oppression, and, with them, the whole train of feelings and passions which lead to discord and conflict between different portions of the community. Impelled by the imperious necessity of preventing the suspension of the action of government, with the fatal consequences to which it would lead, and by the strong additional impulse derived from an ardent love of country, each portion would regard the sacrifice it might have to make by yielding its peculiar interest to secure the common interest and safety of all, including its own, as nothing compared to the evils that would be inflicted on all, including its own, by pertinaciously adhering to a different line of action. So powerful, indeed, would be the motives for concurring, and, under such circumstances, so weak would be those opposed to it, the wonder would be, not that there should, but that there should not be a compromise.

But to form a juster estimate of the full force of this impulse to compromise, there must be added that, in governments of the concurrent majority, each portion, in order to advance its own peculiar interests, would have to conciliate all others, by showing a disposition to advance theirs; and, for this purpose, each would select those to represent it, whose wisdom, patriotism, and weight of character, would command the confidence of the others. Under its influence,—and with representatives so well qualified to accomplish the object for which they were selected,—the prevailing desire would be, to promote the common interests of the whole; and, hence, the competition would be, not which should yield the least to promote the common good, but which should yield the most. It is thus, that concession would cease to be considered a sacrifice,—would become a free-will offering on the altar of the country, and lose the name of compromise. And herein is to be found the feature, which distinguishes governments of the concurrent majority so strikingly from those of the numerical. In the latter, each faction, in the struggle to obtain the control of the government, elevates to power the designing, the artful, and unscrupulous, who, in their devotion to party,—instead of aiming at the good of the whole,—aim exclusively at securing the ascendency of party.

When traced to its source, this difference will be found to originate in the fact, that, in governments of the concurrent majority, individual feelings are, from its organism, necessarily enlisted on the side of the social, and made to unite with them in

promoting the interests of the whole, as the best way of promoting the separate interests of each; while, in those of the numerical majority, the social are necessarily enlisted on the side of the individual, and made to contribute to the interest of parties, regardless of that of the whole. To effect the former,—to enlist the individual on the side of the social feelings to promote the good of the whole, is the greatest possible achievement of the science of government; while, to enlist the social on the side of the individual to promote the interest of parties at the expense of the good of the whole, is the greatest blunder which ignorance can possibly commit.

To this, also, may be referred the greater solidity of foundation on which governments of the concurrent majority repose. Both, ultimately, rest on necessity; for force, by which those of the numerical majority are upheld, is only acquiesced in from necessity; a necessity not more imperious, however, than that which compels the different portions, in governments of the concurrent majority, to acquiesce in compromise. There is, however, a great difference in the motive, the feeling, the aim, which characterize the act in the two cases. In the one, it is done with that reluctance and hostility ever incident to enforced submission to what is regarded as injustice and oppression; accompanied by the desire and purpose to seize on the first favorable opportunity for resistance:—but in the other, willingly and cheerfully, under the impulse of an exalted patriotism, impelling all to acquiesce in whatever the common good requires.

It is, then, a great error to suppose that the government of the concurrent majority is impracticable;—or that it rests on a feeble foundation. History furnishes many examples of such governments;—and among them, one, in which the principle was carried to an extreme that would be thought impracticable, had it never existed. I refer to that of Poland. In this it was carried to such an extreme that, in the election of her kings, the concurrence or acquiescence of every individual of the nobles and gentry present, in an assembly numbering usually from one hundred and fifty to two hundred thousand, was required to make a choice; thus giving to each individual a veto on his election. So, likewise, every member of her Diet, (the supreme legislative body,) consisting of the king, the senate, bishops and deputies of the nobility and gentry of the palatinates, possessed a veto on all its proceedings;—thus making an unanimous vote necessary to enact a law, or to adopt any measure whatever. And, as if to carry the principle to the utmost extent, the veto of a single member not only defeated the particular bill or measure in question, but prevented all others, passed during the session, from taking effect. Further, the principle could not be carried. It, in fact, made every individual of the nobility and gentry, a distinct element in the organism;—or, to vary the expression, made him an *Estate of the kingdom.* And yet this government lasted, in this form, more than two centuries; embracing the period of Poland's greatest power and renown. Twice, during its existence, she protected

Christendom, when in great danger, by defeating the Turks under the walls of Vienna, and permanently arresting thereby the tide of their conquests westward.

It is true her government was finally subverted, and the people subjugated, in consequence of the extreme to which the principle was carried; not, however, because of its tendency to dissolution *from weakness*, but from the facility it afforded to powerful and unscrupulous neighbors to control, by their intrigues, the election of her kings. But the fact, that a government, in which the principle was carried to the utmost extreme, not only existed, but existed for so long a period, in great power and splendor, is proof conclusive both of its practicability and its compatibility with the power and permanency of government.

Another example, not so striking indeed, but yet deserving notice, is furnished by the government of a portion of the aborigines of our own country. I refer to the Confederacy of the Six Nations, who inhabited what now is called the western portion of the State of New-York. One chief delegate, chosen by each nation,—associated with six others of his own selection,—and making, in all, forty-two members,—constituted their federal, or general government. When met, they formed the council of the union,—and discussed and decided all questions relating to the common welfare. As in the Polish Diet, each member possessed a veto on its decision; so that nothing could be done without the united consent of all. But this, instead of mak-

ing the Confederacy weak, or impracticable, had the opposite effect. It secured harmony in council and action, and with them a great increase of power. The Six Nations, in consequence, became the most powerful of all the Indian tribes within the limits of our country. They carried their conquest and authority far beyond the country they originally occupied.

I pass by, for the present, the most distinguished of all these examples;—the Roman Republic;—where the veto, or negative power, was carried, not indeed to the same extreme as in the Polish government, but very far, and with great increase of power and stability;—as I shall show more at large hereafter.

It may be thought,—and doubtless many have supposed, that the defects inherent in the government of the numerical majority may be remedied by a free press, as the organ of public opinion,—especially in the more advanced stage of society,—so as to supersede the necessity of the concurrent majority to counteract its tendency to oppression and abuse of power. It is not my aim to detract from the importance of the press, nor to underestimate the great power and influence which it has given to public opinion. On the contrary, I admit these are so great, as to entitle it to be considered a new and important political element. Its influence is, at the present day, on the increase; and it is highly probable that it may, in combination with the causes which have contributed to raise it to its present importance, effect, in time, great changes,—social and

political. But, however important its present influence may be, or may hereafter become,—or, however great and beneficial the changes to which it may ultimately lead, it can never counteract the tendency of the numerical majority to the abuse of power,—nor supersede the necessity of the concurrent, as an essential element in the formation of constitutional governments. These it cannot effect for two reasons, either of which is conclusive.

The one is, that it cannot change that principle of our nature, which makes constitutions necessary to prevent government from abusing its powers,—and government necessary to protect and perfect society.

Constituting, as this principle does, an essential part of our nature,—no increase of knowledge and intelligence, no enlargement of our sympathetic feelings, no influence of education, or modification of the condition of society can change it. But so long as it shall continue to be an essential part of our nature, so long will government be necessary; and so long as this continues to be necessary, so long will constitutions, also, be necessary to counteract its tendency to the abuse of power,—and so long must the concurrent majority remain an essential element in the formation of constitutions. The press may do much,—by giving impulse to the progress of knowledge and intelligence, to aid the cause of education, and to bring about salutary changes in the condition of society. These, in turn, may do much to explode political errors,—to teach how governments should be constructed in order to fulfil their ends; and by what means they can be

best preserved, when so constructed. They may, also, do much to enlarge the social, and to restrain the individual feelings;—and thereby to bring about a state of things, when far less power will be required by governments to guard against internal disorder and violence, and external danger; and when, of course, the sphere of power may be greatly contracted and that of liberty proportionally enlarged. But all this would not change the nature of man; nor supersede the necessity of government. For so long as government exists, the possession of its control, as the means of directing its action and dispensing its honors and emoluments, will be an object of desire. While this continues to be the case, it must, in governments of the numerical majority, lead to party struggles; and, as has been shown, to all the consequences, which necessarily follow in their train, and, against which, the only remedy is the concurrent majority.

The other reason is to be found in the nature of the influence, which the press politically exercises.

It is similar, in most respects, to that of suffrage. They are, indeed, both organs of public opinion. The principal difference is, that the one has much more agency in forming public opinion, while the other gives a more authentic and authoritative expression to it. Regarded in either light, the press cannot, of itself, guard any more against the abuse of power, than suffrage; and for the same reason.

If what is called public opinion were always the opinion of the whole community, the press would,

as its organ, be an effective guard against the abuse of power, and supersede the necessity of the concurrent majority; just as the right of suffrage would do, where the community, in reference to the action of government, had but one interest. But such is not the case. On the contrary, what is called public opinion, instead of being the united opinion of the whole community, is, usually, nothing more than the opinion or voice of the strongest interest, or combination of interests; and, not unfrequently, of a small, but energetic and active portion of the whole. Public opinion, in relation to government and its policy, is as much divided and diversified, as are the interests of the community; and the press, instead of being the organ of the whole, is usually but the organ of these various and diversified interests respectively; or, rather, of the parties growing out of them. It is used by them as the means of controlling public opinion, and of so moulding it, as to promote their peculiar interests, and to aid in carrying on the warfare of party. But as the organ and instrument of parties, in governments of the numerical majority, it is as incompetent as suffrage itself, to counteract the tendency to oppression and abuse of power;—and can, no more than that, supersede the necessity of the concurrent majority. On the contrary, as the instrument of party warfare, it contributes greatly to increase party excitement, and the violence and virulence of party struggles; and, in the same degree, the tendency to oppression and abuse of power. Instead, then, of superseding the necessity of the

concurrent majority, it increases it, by increasing the violence and force of party feelings,—in like manner as party caucuses and party machinery; of the latter of which, indeed, it forms an important part.

In one respect, and only one, the government of the numerical majority has the advantage over that of the concurrent, if, indeed, it can be called an advantage. I refer to its simplicity and facility of construction. It is simple indeed, wielded, as it is, by a single power—the will of the greater number—and very easy of construction. For this purpose, nothing more is necessary than universal suffrage, and the regulation of the manner of voting, so as to give to the greater number the supreme control over every department of government.

But, whatever advantages simplicity and facility of construction may give it, the other forms of absolute government possess them in a still higher degree. The construction of the government of the numerical majority, simple as it is, requires some preliminary measures and arrangements; while the others, especially the monarchical, will, in its absence, or where it proves incompetent, force themselves on the community. And hence, among other reasons, the tendency of all governments is, from the more complex and difficult of construction, to the more simple and easily constructed; and, finally, to absolute monarchy, as the most simple of all. Complexity and difficulty of construction, as far as they form objections, apply, not only to governments of the concurrent majority of the popular form, but to

constitutional governments of every form. The least complex, and the most easily constructed of them, are much more complex and difficult of construction than any one of the absolute forms. Indeed, so great has been this difficulty, that their construction has been the result, not so much of wisdom and patriotism, as of favorable combinations of circumstances. They have, for the most part, grown out of the struggles between conflicting interests, which, from some fortunate turn, have ended in a compromise, by which both parties have been admitted, in some one way or another, to have a separate and distinct voice in the government. Where this has not been the case, they have been the product of fortunate circumstances, acting in conjunction with some pressing danger, which forced their adoption, as the only means by which it could be avoided. It would seem that it has exceeded human sagacity deliberately to plan and construct constitutional governments, with a full knowledge of the principles on which they were formed; or to reduce them to practice without the pressure of some immediate and urgent necessity. Nor is it surprising that such should be the case; for it would seem almost impossible for any man, or body of men, to be so profoundly and thoroughly acquainted with the people of any community which has made any considerable progress in civilization and wealth, with all the diversified interests ever accompanying them, as to be able to organize constitutional governments suited to their condition. But, even were this possible, it would be difficult to find

any community sufficiently enlightened and patriotic to adopt such a government, without the compulsion of some pressing necessity. A constitution, to succeed, must spring from the bosom of the community, and be adapted to the intelligence and character of the people, and all the multifarious relations, internal and external, which distinguish one people from another. If it do not, it will prove, in practice, to be, not a constitution, but a cumbrous and useless machine, which must be speedily superseded and laid aside, for some other more simple, and better suited to their condition.

It would thus seem almost necessary that governments should commence in some one of the simple and absolute forms, which, however well suited to the community in its earlier stages, must, in its progress, lead to oppression and abuse of power, and, finally, to an appeal to force,—to be succeeded by a military despotism,—unless the conflicts to which it leads should be fortunately adjusted by a compromise, which will give to the respective parties a participation in the control of the government; and thereby lay the foundation of a constitutional government, to be afterwards matured and perfected. Such governments have been, emphatically, the product of circumstances. And hence, the difficulty of one people imitating the government of another. And hence, also, the importance of terminating all civil conflicts by a compromise, which shall prevent either party from obtaining complete control, and thus subjecting the other.

Of the different forms of constitutional govern-

ments, the popular is the most complex and difficult of construction. It is, indeed, so difficult, that ours, it is believed, may with truth be said to be the only one of a purely popular character, of any considerable importance, that ever existed. The cause is to be found in the fact, that, in the other two forms, society is arranged in artificial orders or classes. Where these exist, the line of distinction between them is so strongly marked as to throw into shade, or, otherwise, to absorb all interests which are foreign to them respectively. Hence, in an aristocracy, all interests are, politically, reduced to two,—the nobles and the people; and in a monarchy, with a nobility, into three,---the monarch, the nobles, and the people. In either case, they are so few that the sense of each may be taken separately, through its appropriate organ, so as to give to each a concurrent voice, and a negative on the other, through the usual departments of the government, without making it too complex, or too tardy in its movements to perform, with promptness and energy, all the necessary functions of government.

The case is different in constitutional governments of the popular form. In consequence of the absence of these artificial distinctions, the various natural interests, resulting from diversity of pursuits, condition, situation and character of different portions of the people,---and from the action of the government itself,---rise into prominence, and struggle to obtain the ascendency. They will, it is true, in governments of the numerical majority, ultimately coalesce, and form two great parties; but not so

closely as to lose entirely their separate character and existence. These they will ever be ready to re-assume, when the objects for which they coalesced are accomplished. To overcome the difficulties occasioned by so great a diversity of interests, an organism far more complex is necessary.

Another obstacle, difficult to be overcome, opposes the formation of popular constitutional governments. It is much more difficult to terminate the struggles between conflicting interests, by compromise, in absolute popular governments, than in an aristocracy or monarchy.

In an aristocracy, the object of the people, in the ordinary struggle between them and the nobles, is not, at least in its early stages, to overthrow the nobility and revolutionize the government,—but to participate in its powers. Notwithstanding the oppression to which they may be subjected, under this form of government, the people commonly feel no small degree of respect for the descendants of a long line of distinguished ancestors; and do not usually aspire to more,—in opposing the authority of the nobles,—than to obtain such a participation in the powers of the government, as will enable them to correct its abuses and to lighten their burdens. Among the nobility, on the other hand, it sometimes happens that there are individuals of great influence with both sides, who have the good sense and patriotism to interpose, in order to effect a compromise by yielding to the reasonable demands of the people; and, thereby, to avoid the hazard of a final and decisive appeal to force. It is thus, by a

judicious and timely compromise, the people, in such governments, may be raised to a participation in the administration sufficient for their protection, without the loss of authority on the part of the nobles.

In the case of a monarchy, the process is somewhat different. Where it is a military despotism, the people rarely have the spirit or intelligence to attempt resistance; or, if otherwise, their resistance must almost necessarily terminate in defeat, or in a mere change of dynasty,—by the elevation of their leader to the throne. It is different, where the monarch is surrounded by an hereditary nobility. In a struggle between him and them, both (but especially the monarch) are usually disposed to court the people, in order to enlist them on their respective sides,—a state of things highly favorable to their elevation. In this case, the struggle, if it should be long continued without decisive results, would almost necessarily raise them to political importance, and to a participation in the powers of the government.

The case is different in an absolute Democracy. Party conflicts between the majority and minority, in such governments, can hardly ever terminate in compromise.—The object of the opposing minority is to expel the majority from power; and of the majority to maintain their hold upon it. It is, on both sides, a struggle for the whole,—a struggle that must determine which shall be the governing, and which the subject party;—and, in character, object and result, not unlike that between competitors for the sceptre in absolute monarchies. Its

regular course, as has been shown, is, excessive violence,—an appeal to force,—followed by revolution,—and terminating at last, in the elevation to supreme power of the general of the successful party. And hence, among other reasons, aristocracies and monarchies more readily assume the constitutional form than absolute popular goverments.

Of the three different forms, the monarchical has heretofore been much the most prevalent, and, generally, the most powerful and durable. This result is doubtless to be attributed principally to the fact that, in its absolute form, it is the most simple and easily constructed. And hence, as government is indispensable, communities having too little intelligence to form or preserve the others, naturally fall into this. It may also, in part, be attributed to another cause, already alluded to; that, in its organism and character, it is much more closely assimilated than either of the other two, to military power; on which all absolute governments depend for support. And hence, also, the tendency of the others, and of constitutional governments which have been so badly constructed or become so disorganized as to require force to support them,—to pass into military despotism,—that is, into monarchy in its most absolute and simple form. And hence, again, the fact, that revolutions in absolute monarchies, end, almost invariably, in a change of dynasty,—and not of the forms of the government; as is almost universally the case in the other systems.

But there are, besides these, other causes of a higher character, which contribute much to make

monarchies the most prevalent, and, usually, the most durable governments. Among them, the leading one is, they are the most susceptible of improvement;—that is, they can be more easily and readily modified, so as to prevent, to a limited extent, oppression and abuse of power, without assuming the constitutional form, in its strict sense. It slides, almost naturally, into one of the most important modifications. I refer to hereditary descent. When this becomes well defined and firmly established, the community or kingdom, comes to be regarded by the sovereign as the hereditary possession of his family,—a circumstance which tends strongly to identify his interests with those of his subjects, and thereby, to mitigate the rigor of the government. It gives, besides, great additional security to his person; and prevents, in the same degree, not only the suspicion and hostile feelings incident to insecurity,—but invites all those kindly feelings which naturally spring up on both sides, between those whose interests are identified,—when there is nothing to prevent it. And hence the strong feelings of paternity on the side of the sovereign,—and of loyalty on that of his subjects, which are often exhibited in such governments.

There is another improvement of which it is readily susceptible, nearly allied to the preceding. The hereditary principle not unfrequently extends to other families,—especially to those of the distinguished chieftains, by whose aid the monarchy was established, when it originates in conquest. When this is the case,—and a powerful body of hereditary

nobles surround the sovereign, they oppose a strong resistance to his authority, and he to theirs,—tending to the advantage and security of the people. Even when they do not succeed in obtaining a participation in the powers of the government, they usually acquire sufficient weight to be felt and respected. From this state of things, such governments usually, in time, settle down on some fixed rules of action, which the sovereign is compelled to respect, and by which increased protection and security are acquired by all. It was thus the enlightened monarchies of Europe were formed, under which the people of that portion of the globe have made such great advances in power, intelligence, and civilization.

To these may be added the greater capacity, which governments of the monarchical form have exhibited, to hold under subjection a large extent of territory, and a numerous population; and which has made them more powerful than others of a different form, to the extent, that these constitute an element of power. All these causes combined, have given such great and decisive advantages, as to enable them, heretofore, to absorb, in the progress of events, the few governments which have, from time to time, assumed different forms;—not excepting even the mighty Roman Republic, which, after attaining the highest point of power, passed, seemingly under the operation of irresistible causes, into a military despotism. I say, heretofore,—for it remains to be seen whether they will continue to retain their advantages, in these respects, over the others, under

the great and growing influence of public opinion, and the new and imposing form which popular government has assumed with us.

These have already effected great changes, and will probably effect still greater,—adverse to the monarchical form; but, as yet, these changes have tended rather to the absolute, than to the constitutional form of popular government,—for reasons which have been explained. If this tendency should continue permanently in the same direction, the monarchical form must still retain its advantages, and continue to be the most prevalent. Should this be the case, the alternative will be between monarchy and popular government, in the form of the numerical majority,—or absolute democracy; which, as has been shown, is not only the most fugitive of all the forms, but has the strongest tendency of all others to the monarchical. If, on the contrary, this tendency, or the changes referred to, should incline to the constitutional form of popular government,—and a proper organism come to be regarded as not less indispensable than the right of suffrage to the establishment of such governments,—in such case, it is not improbable that, in the progress of events, the monarchical will cease to be the prevalent form of government. Whether they will take this direction, at least for a long time, will depend on the success of our government,—and a correct understanding of the principles on which it is constructed.

To comprehend more fully the force and bearing of public opinion, and to form a just estimate of

the changes to which, aided by the press, it will probably lead, politically and socially,—it will be necessary to consider it in connection with the causes that have given it an influence so great, as to entitle it to be regarded as a new political element. They will, upon investigation, be found in the many discoveries and inventions made in the last few centuries.

Among the more prominent of those of an earlier date, stand the practical application of the magnetic power to the purposes of navigation, by the invention of the mariner's compass; the discovery of the mode of making gunpowder, and its application to the art of war; and the invention of the art of printing. Among the more recent are, the numerous chemical and mechanical discoveries and inventions, and their application to the various arts of production; the application of steam to machinery of almost every description, especially to such as is designed to facilitate transportation and travel by land and water; and, finally, the invention of the magnetic telegraph.

All these have led to important results. Through the invention of the mariner's compass, the globe has been circumnavigated and explored, and all who inhabit it, with but few exceptions, brought within the sphere of an all-pervading commerce, which is daily diffusing over its surface the light and blessings of civilization. Through that of the art of printing, the fruits of observation and reflection, of discoveries and inventions, with all the accumulated stores of previously acquired knowledge, are pre-

served and widely diffused. The application of gunpowder to the art of war, has for ever settled the long conflict for ascendency between civilization and barbarism, in favor of the former, and thereby guarantied that, whatever knowledge is now accumulated, or may hereafter be added, shall never again be lost. The numerous discoveries and inventions, chemical and mechanical, and the application of steam to machinery, have increased, many-fold, the productive powers of labor and capital; and have, thereby, greatly increased the number, who may devote themselves to study and improvement, —and the amount of means necessary for commercial exchanges,—especially between the more and the less advanced and civilized portions of the globe, —to the great advantage of both, but particularly of the latter. The application of steam to the purposes of travel and transportation, by land and water, has vastly increased the facility, cheapness and rapidity of both;—diffusing, with them, information and intelligence almost as quickly and as freely as if borne by the winds; while the electrical wires outstrip them, in velocity—rivalling, in rapidity, even thought itself.

The joint effect of all has been, a great increase and diffusion of knowledge; and, with this, an impulse to progress and civilization heretofore unexampled in the history of the world,—accompanied by a mental energy and activity unprecedented.

To all these causes, public opinion, and its organ, the press, owe their origin and great influence. Already they have attained a force in the more civil-

ized portions of the globe sufficient to be felt by all governments, even the most absolute and despotic. But, as great as they now are, they have as yet attained nothing like their maximum force. It is probable, that not one of the causes, which have contributed to their formation and influence, has yet produced its full effect; while several of the most powerful have just begun to operate; and many others, probably of equal or even greater force, yet remain to be brought to light.

When the causes now in operation have produced their full effect, and inventions and discoveries shall have been exhausted,—if that may ever be,—they will give a force to public opinion, and cause changes, political and social, difficult to be anticipated. What will be their final bearing, time only can decide with any certainty. That they will, however, greatly improve the condition of man ultimately,—it would be impious to doubt. It would be to suppose, that the all-wise and beneficent Being,—the Creator of all,—had so constituted man, as that the employment of the high intellectual faculties, with which He has been pleased to endow him, in order that he might develop the laws that control the great agents of the material world, and make them subservient to his use,—would prove to him the cause of permanent evil,—and not of permanent good. If, then, such a supposition be inadmissible, they must, in their orderly and full development, end in his permanent good. But this cannot be, unless the ultimate effect of their action, politically, shall be, to give ascendency to that form

of government best calculated to fulfil the ends for which government is ordained. For, so completely does the well-being of our race depend on good government, that it is hardly possible any change, the ultimate effect of which should be otherwise, could prove to be a permanent good.

It is, however, not improbable, that many and great, but temporary evils, will follow the changes they have effected, and are destined to effect. It seems to be a law in the political, as well as in the material world, that great changes cannot be made, except very gradually, without convulsions and revolutions; to be followed by calamities, in the beginning, however beneficial they may prove to be in the end. The first effect of such changes, on long established governments, will be, to unsettle the opinions and principles in which they originated,—and which have guided their policy,—before those, which the changes are calculated to form and establish, are fairly developed and understood. The interval between the decay of the old and the formation and establishment of the new, constitutes a period of transition, which must always necessarily be one of uncertainty, confusion, error, and wild and fierce fanaticism.

The governments of the more advanced and civilized portions of the world are now in the midst of this period. It has proved, and will continue to prove a severe trial to existing political institutions of every form. Those governments which have not the sagacity to perceive what is truly public opinion,—to distinguish between it and the mere clamor of fac-

tion, or shouts of fanaticism,—and the good sense and firmness to yield, timely and cautiously, to the claims of the one,—and to resist, promptly and decidedly, the demands of the other,—are doomed to fall. Few will be able successfully to pass through this period of transition; and these, not without shocks and modifications, more or less considerable. It will endure until the governing and the governed shall better understand the ends for which government is ordained, and the form best adapted to accomplish them, under all the circumstances in which communities may be respectively placed.

I shall, in conclusion, proceed to exemplify the elementary principles, which have been established, by giving a brief account of the origin and character of the governments of Rome and Great Britain; the two most remarkable and perfect of their respective forms of constitutional governments. The object is to show how these principles were applied, in the more simple forms of such governments; preparatory to an exposition of the mode in which they have been applied in our own more complex system. It will appear that, in each, the principles are the same; and that the difference in their application resulted from the different situation and social condition of the respective communities. They were modified, in each, so as to conform to these; and, hence, their remarkable success. They were applied to communities in which hereditary rank had long prevailed. Their respective constitutions originated in concession to the people; and, through them, they acquired a participation in the powers of

government. But with us, they were applied to communities where all political rank and distinction between citizens were excluded; and where government had its origin in the will of the people.

But, however different their origin and character, it will be found that the object in each was the same, —to blend and harmonize the conflicting interests of the community; and the means the same,—taking the sense of each class or portion through its appropriate organ, and considering the concurrent sense of all as the sense of the whole community. Such being the fact, an accurate and clear conception how this was effected, in their more simple forms, will enable us better to understand how it was accomplished in our far more refined, artificial, and complex form.

It is well known to all, the least conversant with their history, that the Roman people consisted of two distinct orders, or classes,—the Patricians and the Plebeians; and that the line of distinction was so strongly drawn, that, for a long time, the right of intermarriage between them was prohibited. After the overthrow of the monarchy and the expulsion of the Tarquins, the government fell exclusively under the control of the patricians, who, with their clients and dependents, formed, at the time, a very numerous and powerful body. At first, while there was danger of the return of the exiled family, they treated the plebeians with kindness; but, after it had passed away, with oppression and cruelty.

It is not necessary, with the object in view, to enter into a minute account of the various acts of

oppression and cruelty to which they were subjected. It is sufficient to state, that, according to the usages of war at the time, the territory of a conquered people became the property of the conquerors; and that the plebeians were harassed and oppressed by incessant wars, in which the danger and toil were theirs, while all the fruits of victory, (the lands of the vanquished, and the spoils of war,) accrued to the benefit of their oppressors. The result was such as might be expected. They were impoverished, and forced, from necessity, to borrow from the patricians, at usurious and exorbitant interest, funds with which they had been enriched through their blood and toil; and to pledge their all for repayment at stipulated periods. In case of default, the pledge became forfeited; and, under the provisions of law in such cases, the debtors were liable to be seized, and sold or imprisoned by their creditors in private jails prepared and kept for the purpose. These savage provisions were enforced with the utmost rigor against the indebted and impoverished plebeians. They constituted, indeed, an essential part of the system through which they were plundered and oppressed by the patricians.

A system so oppressive could not be endured. The natural consequences followed. Deep hatred was engendered between the orders, accompanied by factions, violence, and corruption, which distracted and weakened the government. At length, an incident occurred which roused the indignation of the plebeians to the utmost pitch, and which ended in an open rupture between the two orders.

An old soldier, who had long served the country, and had fought with bravery in twenty-eight battles, made his escape from the prison of his creditor, —squalid, pale, and famished. He implored the protection of the plebeians. A crowd surrounded him; and his tale of service to the country, and the cruelty with which he had been treated by his creditor, kindled a flame, which continued to rage until it extended to the army. It refused to continue any longer in service,—crossed the Anio, and took possession of the sacred mount. The patricians divided in opinion as to the course which should be pursued. The more violent insisted on an appeal to arms, but, fortunately, the counsel of the moderate, which recommended concession and compromise, prevailed. Commissioners were appointed to treat with the army; and a formal compact was entered into between the orders, and ratified by the oaths of each, which conceded to the plebeians the right to elect two tribunes, as the protectors of their order, and made their persons sacred. The number was afterwards increased to ten, and their election by centuries changed to election by tribes;—a mode by which the plebeians secured a decided preponderance.

Such was the origin of the tribunate;—which, in process of time, opened all the honors of the government to the plebeians. They acquired the right, not only of vetoing the passage of all laws, but also their execution; and thus obtained, through their tribunes, a negative on the entire action of the government, without divesting the patricians of their control over the Senate. By this arrangement, the

government was placed under the concurrent and joint voice of the two orders, expressed through separate and appropriate organs; the one possessing the positive, and the other the negative powers of the government. This simple change converted it from an absolute, into a constitutional government,—from a government of the patricians only, to that of the whole Roman people,—and from an aristocracy into a republic. In doing this, it laid the solid foundation of Roman liberty and greatness.

A superficial observer would pronounce a government, so organized, as that one order should have the power of making and executing the laws, and another, or the representatives of another, the unlimited authority of preventing their enactment and execution,—if not wholly impracticable, at least, too feeble to stand the shocks to which all governments are subject; and would, therefore, predict its speedy dissolution, after a distracted and inglorious career.

How different from the result! Instead of distraction, it proved to be the bond of concord and harmony; instead of weakness, of unequalled strength;—and, instead of a short and inglorious career, one of great length and immortal glory. It moderated the conflicts between the orders; harmonized their interests, and blended them into one; substituted devotion to country in the place of devotion to particular orders; called forth the united strength and energy of the whole, in the hour of danger; raised to power, the wise and patriotic; elevated the Roman name above all

others; extended her authority and dominion over the greater part of the then known world, and transmitted the influence of her laws and institutions to the present day. Had the opposite counsel prevailed at this critical juncture; had an appeal been made to arms instead of to concession and compromise, Rome, instead of being what she afterwards became, would, in all probability, have been as inglorious, and as little known to posterity as the insignificant states which surrounded her, whose names and existence would have been long since consigned to oblivion, had they not been preserved in the history of her conquests of them. But for the wise course then adopted, it is not improbable,—whichever order might have prevailed,—that she would have fallen under some cruel and petty tyrant;—and, finally, been conquered by some of the neighboring states,—or by the Carthaginians, or the Gauls. To the fortunate turn which events then took, she owed her unbounded sway and imperishable renown.

It is true, that the tribunate, after raising her to a height of power and prosperity never before equalled, finally became one of the instruments by which her liberty was overthrown:—but it was not until she became exposed to new dangers, growing out of increase of wealth and the great extent of her dominions, against which the tribunate furnished no guards. Its original object was the protection of the plebeians against oppression and abuse of power on the part of the patricians. This, it thoroughly accomplished; but it had no power to

protect the people of the numerous and wealthy conquered countries from being plundered by consuls and proconsuls. Nor could it prevent the plunderers from using the enormous wealth, which they extorted from the impoverished and ruined provinces, to corrupt and debase the people; nor arrest the formation of parties, (irrespective of the old division of patricians and plebeians,) having no other object than to obtain the control of the government for the purpose of plunder. Against these formidable evils, her constitution furnished no adequate security. Under their baneful influence, the possession of the government became the object of the most violent conflicts; not between patricians and plebeians,—but between profligate and corrupt factions. They continued with increasing violence, until, finally, Rome sunk, as must every community under similar circumstances, beneath the strong grasp, the despotic rule of the chieftain of the successful party;—the sad, but only alternative which remained to prevent universal violence, confusion and anarchy. The Republic had, in reality, ceased to exist long before the establishment of the Empire. The interval was filled by the rule of ferocious, corrupt and bloody factions. There was, indeed, a small but patriotic body of eminent individuals, who struggled, in vain, to correct abuses, and to restore the government to its primitive character and purity;—and who sacrificed their lives in their endeavors to accomplish an object so virtuous and noble. But it can be no disparagement to the tribunate, that the great powers conferred on it for wise pur-

poses, and which it had so fully accomplished, should be seized upon, during this violent and corrupt interval, to overthrow the liberty it had established, and so long nourished and supported.

In assigning such consequence to the tribunate, I must not overlook other important provisions of the Constitution of the Roman government. The Senate, as far as we are informed, seems to have been admirably constituted to secure consistency and steadiness of action. The power,—when the Republic was exposed to imminent danger,—to appoint a dictator,—vested, for a limited period, with almost boundless authority; the two consuls, and the manner of electing them; the auguries; the sibylline books; the priesthood, and the censorship;—all of which appertained to the patricians,—were, perhaps indispensable to withstand the vast and apparently irregular power of the tribunate;—while the possession of such great powers by the patricians, made it necessary to give proportionate strength to the only organ through which the plebeians could act on the government with effect. The government was, indeed, powerfully constituted; and, apparently, well proportioned both in its positive and negative organs. It was truly an iron government. Without the tribunate, it proved to be one of the most oppressive and cruel that ever existed; but with it, one of the strongest and best.

The origin and character of the British government are so well known, that a very brief sketch, with the object in view, will suffice.

The causes which ultimately moulded it into its

present form, commenced with the Norman Conquest. This introduced the feudal system, with its necessary appendages, a hereditary monarchy and nobility; the former in the line of the chief, who led the invading army;—and the latter in that of his distinguished followers. They became his feudatories. The country,—both land and people,—(the latter as serfs,) was divided between them. Conflicts soon followed between the monarch and the nobles,—as must ever be the case under such systems. They were followed, in the progress of events, by efforts, on the part both of monarchs and nobles, to conciliate the favor of the people. They, in consequence, gradually rose to power. At every step of their ascent, they became more important,—and were more and more courted,—until at length their influence was so sensibly felt, that they were summoned to attend the meeting of parliament by delegates; not, however, as an estate of the realm, or constituent member of the body politic. The first summons came from the nobles; and was designed to conciliate their good feelings and secure their cooperation in the war against the king. This was followed by one from him; but his object was simply to have them present at the meeting of parliament, in order to be *consulted* by the crown, on questions relating to taxes and supplies; not, indeed, to discuss the right to lay the one, and to raise the other,—for the King claimed the arbitrary authority to do both,—but with a view to facilitate their collection, and to reconcile them to their imposition.

From this humble beginning, they, after a long

struggle, accompanied by many vicissitudes, raised themselves to be considered one of the estates of the realm; and, finally, in their efforts to enlarge and secure what they had gained, overpowered, for a time, the other two estates; and thus concentrated all power in a single estate or body. This, in effect, made the government absolute, and led to consequences which, as by a fixed law, must ever result in popular governments of this form;—namely:—to organized parties, or, rather, factions, contending violently to obtain or retain the control of the government; and this, again, by laws almost as uniform, to the concentration of all the powers of government in the hands of the military commander of the successful party.

His heir was too feeble to hold the sceptre he had grasped; and the general discontent with the result of the revolution, led to the restoration of the old dynasty; without defining the limits between the powers of the respective estates.

After a short interval, another revolution followed, in which the lords and commons united against the king. This terminated in his overthrow; and the transfer of the crown to a collateral branch of the family, accompanied by a declaration of rights, which defined the powers of the several estates of the realm; and, finally, perfected and established the constitution. Thus, a feudal monarchy was converted, through a slow but steady process of many centuries, into a highly refined constitutional monarchy, without changing the basis of the original government.

As it now stands, the realm consists of three estates; the king; the lords temporal and spiritual; and the commons. The parliament is the grand council. It possesses the supreme power. It enacts laws, by the concurring assent of the lords and commons,—subject to the approval of the king. The executive power is vested in the monarch, who is regarded as constituting the first estate. Although irresponsible himself, he can only act through responsible ministers and agents. They are responsible to the other estates; to the lords, as constituting the high court before whom all the servants of the crown may be tried for malpractices, and crimes against the realm, or official delinquencies;—and to the commons, as possessing the impeaching power, and constituting the grand inquest of the kingdom. These provisions, with their legislative powers,—especially that of withholding supplies,—give them a controlling influence on the executive department, and, virtually, a participation in its powers;—so that the acts of the government, throughout its entire range, may be fairly considered as the result of the concurrent and joint action of the three estates;—and, as these embrace all the orders,—of the concurrent and joint action of the estates of the realm.

He would take an imperfect and false view of the subject who should consider the king, in his mere individual character, or even as the head of the royal family,—as constituting an estate. Regarded in either light, so far from deserving to be considered as the First Estate,—and the head of the realm, as he is,—he would represent an interest too incon-

siderable to be an object of special protection. Instead of this, he represents what in reality is, habitually and naturally, the most powerful interest, all things considered, under every form of government in all civilized communities,—*the tax-consuming interest;* or, more broadly, the great interest which necessarily grows out of the action of the government, be its form what it may;—the interest that *lives by the government.* It is composed of the recipients of its honors and emoluments; and may be properly called, the government interest, or party;—in contradistinction to the rest of the community,—or, (as they may be properly called,) the people or commons. The one comprehends all who are supported by the government;—and the other all who support the government:—and it is only because the former are strongest, all things being considered, that they are enabled to retain, for any considerable time, advantages so great and commanding.

This great and predominant interest is naturally represented by a single head. For it is impossible, without being so represented, to distribute the honors and emoluments of the government among those who compose it, without producing discord and conflict:—and it is only by preventing these, that advantages so tempting can be long retained. And, hence, the strong tendency of this great interest to the monarchical form;—that is, to be represented by a single individual. On the contrary, the antagonistic interest,—that which supports the government, has the opposite tendency;— a tendency to be represented by many; because a large assembly can

better judge, than one individual or a few, what burdens the community can bear;—and how it can be most equally distributed, and easily collected.

In the British government, the king constitutes an Estate, because he is the head and representative of this great interest. He is the conduit through which, all the honors and emoluments of the government flow;—while the House of Commons, according to the theory of the government, is the head and representative of the opposite—the great tax-paying interest, by which the government is supported.

Between these great interests, there is necessarily a constant and strong tendency to conflict; which, if not counteracted, must end in violence and an appeal to force,—to be followed by revolution, as has been explained. To prevent this, the House of Lords, as one of the estates of the realm, is interposed; and constitutes the conservative power of the government. It consists, in fact, of that portion of the community who are the principal recipients of the honors, emoluments, and other advantages derived from the government; and whose condition cannot be improved, but must be made worse by the triumph of either of the conflicting estates over the other; and, hence, it is opposed to the ascendency of either,—and in favor of preserving the equilibrium between them.

This sketch, brief as it is, is sufficient to show, that these two constitutional governments,—by far the most illustrious of their respective kinds,—conform to the principles that have been established, alike in their origin and in their construction. The

constitutions of both originated in a pressure, occasioned by conflicts of interests between hostile classes or orders, and were intended to meet the pressing exigencies of the occasion; neither party, it would seem, having any conception of the principles involved, or the consequences to follow, beyond the immediate objects in contemplation. It would, indeed, seem almost impossible for constitutional governments, founded on orders or classes, to originate in any other manner. It is difficult to conceive that any people, among whom they did not exist, would, or could voluntarily institute them, in order to establish such governments; while it is not at all wonderful, that they should grow out of conflicts between different orders or classes when aided by a favorable combination of circumstances.

The constitutions of both rest on the same principle;—an organism by which the voice of each order or class is taken through its appropriate organ; and which requires the concurring voice of all to constitute that of the whole community. The effects, too, were the same in both;—to unite and harmonize conflicting interests;—to strengthen attachments to the whole community, and to moderate that to the respective orders or classes; to rally all, in the hour of danger, around the standard of their country; to elevate the feeling of nationality, and to develop power, moral and physical, to an extraordinary extent. Yet each has its distinguishing features, resulting from the difference of their organisms, and the circumstances in which they respectively originated.

In the government of Great Britain, the three orders are blended in the legislative department; so that the separate and concurring act of each is necessary to make laws; while, on the contrary, in the Roman, one order had the power of making laws, and another of annulling them, or arresting their execution. Each had its peculiar advantages. The Roman developed more fully the love of country and the feelings of nationality. "*I am a Roman citizen*,"—was pronounced with a pride and elevation of sentiment, never, perhaps, felt before or since, by any citizen or subject of any community, in announcing the country to which he belonged.

It also developed more fully the power of the community. Taking into consideration their respective population, and the state of the arts at the different periods, Rome developed more power, comparatively, than Great Britain ever has,—vast as that is, and has been,—or, perhaps, than any other community ever did. Hence, the mighty control she acquired from a beginning so humble. But the British government is far superior to that of Rome, in its adaptation and capacity to embrace under its control extensive dominions, without subverting its constitution. In this respect, the Roman constitution was defective;—and, in consequence, soon began to exhibit marks of decay, after Rome had extended her dominions beyond Italy; while the British holds under its sway, without apparently impairing either, an empire equal to that, under the weight of which the constitution and liberty of Rome were crushed. This great advantage it derives from its different

structure, especially that of the executive department; and the character of its conservative principle. The former is so constructed as to prevent, in consequence of its unity and hereditary character, the violent and factious struggles to obtain the control of the government,—and, with it, the vast patronage which distracted, corrupted, and finally subverted the Roman Republic. Against this fatal disease, the latter had no security whatever; while the British government,—besides the advantages it possesses, in this respect, from the structure of its executive department,—has, in the character of its conservative principle, another and powerful security against it. Its character is such, that patronage, instead of weakening, strengthens it:—For, the greater the patronage of the government, the greater will be the share which falls to the estate constituting the conservative department of the government; and the more eligible its condition, the greater its opposition to any radical change in its form. The two causes combined, give to the government a greater capacity of holding under subjection extensive dominions, without subverting the constitution or destroying liberty, than has ever been possessed by any other. It is difficult, indeed, to assign any limit to its capacity in this respect. The most probable which can be assigned is, its ability to bear increased burdens;—the taxation necessary to meet the expenses incident to the acquisition and government of such vast dominions, may prove, in the end, so heavy as to crush, under its weight, the laboring and productive portions of the population.

I have now finished the brief sketch I proposed, of the origin and character of these two renowned governments; and shall next proceed to consider the character, origin and structure of the Government of the United States. It differs from the Roman and British, more than they differ from each other; and, although an existing government of recent origin, its character and structure are perhaps less understood than those of either.

A DISCOURSE

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Ours is a system of governments, compounded of the separate governments of the several States composing the Union, and of one common government of all its members, called the Government of the United States. The former preceded the latter, which was created by their agency. Each was framed by written constitutions; those of the several States by the people of each, acting separately, and in their sovereign character; and that of the United States, by the same, acting in the same character,—but jointly instead of separately. All were formed on the same model. They all divide the powers of government into legislative, executive, and judicial; and are founded on the great principle of the responsibility of the rulers to the ruled. The entire powers of government are divided between the two; those of a more general character being specifically delegated to the United States; and all

others not delegated, being reserved to the several States in their separate character. Each, within its appropriate sphere, possesses all the attributes, and performs all the functions of government. Neither is perfect without the other. The two combined, form one entire and perfect government. With these preliminary remarks, I shall proceed to the consideration of the immediate subject of this discourse.

The Government of the United States was formed by the Constitution of the United States;—and ours is a democratic, federal republic.

It is democratic, in contradistinction to aristocracy and monarchy. It excludes classes, orders, and all artificial distinctions. To guard against their introduction, the constitution prohibits the granting of any title of nobility by the United States, or by any State.* The whole system is, indeed, democratic throughout. It has for its fundamental principle, the great cardinal maxim, that the people are the source of all power; that the governments of the several States and of the United States were created by them, and for them; that the powers conferred on them are not surrendered, but delegated; and, as such, are held in trust, and not absolutely; and can be rightfully exercised only in furtherance of the objects for which they were delegated.

It is federal as well as democratic. *Federal*, on the one hand, in contradistinction to *national*, and,

* 1st Art. 9 and 10 Sec.

on the other, to a *confederacy*. In showing this, I shall begin with the former.

It is federal, because it is the government of States united in a political union, in contradistinction to a government of individuals socially united; that is, by what is usually called, a social compact. To express it more concisely, it is federal and not national, because it is the government of a community of States, and not the government of a single State or nation.

That it is federal and not national, we have the high authority of the convention which framed it. General Washington, as its organ, in his letter submitting the plan to the consideration of the Congress of the then confederacy, calls it, in one place, —"the general government of the Union;"—and in another,—"the federal government of these States." Taken together, the plain meaning is, that the government proposed would be, if adopted, the government of the States adopting it, in their united character as members of a common Union; and, as such, would be a federal government. These expressions were not used without due consideration, and an accurate and full knowledge of their true import. The subject was not a novel one. The convention was familiar with it. It was much agitated in their deliberations. They divided, in reference to it, in the early stages of their proceedings. At first, one party was in favor of a national and the other of a federal government. The former, in the beginning, prevailed; and in the plans which they proposed, the constitution and government are

styled "National." But, finally, the latter gained the ascendency, when the term "National" was superseded, and "*United States*" substituted in its place. The constitution was accordingly styled,—"*The constitution of the United States of America;*"—and the government,—"*The government of the United States;*" leaving out "America," for the sake of brevity. It cannot admit of a doubt, that the Convention, by the expression "United States," meant the States united in a federal Union; for in no other sense could they, with propriety, call the government, "*the federal government of these States*," —and "*the general government of the Union*,"—as they did in the letter referred to. It is thus clear, that the Convention regarded the different expressions,—"the federal government of the United States;"—"the general government of the Union," —and,—"government of the United States,"—as meaning the same thing,—a federal, in contradistinction to a national government.

Assuming it then, as established, that they are the same, it is only necessary, in order to ascertain with precision, what they meant by "*federal government*,"—to ascertain what they meant by "*the government of the United States*." For this purpose it will be necessary to trace the expression to its origin.

It was, at that time, as our history shows, an old and familiar phrase,—having a known and well-defined meaning. Its use commenced with the political birth of these States; and it has been applied to them, in all the forms of government through which

they have passed, without alteration. The style of the present constitution and government is precisely the style by which the confederacy that existed when it was adopted, and which it superseded, was designated. The instrument that formed the latter was called,—"*Articles of Confederation and Perpetual Union.*" Its first article declares that the style of this confederacy shall be, "The United States of America;" and the second, in order to leave no doubt as to the relation in which the States should stand to each other in the confederacy about to be formed, declared,—"Each State retains its sovereignty, freedom and independence; and every power, jurisdiction, and right, which is not, by this confederation, expressly delegated to the United States in Congress assembled." If we go one step further back, the style of the confederacy will be found to be the same with that of the revolutionary government, which existed when it was adopted, and which it superseded. It dates its origin with the Declaration of Independence. That act is styled,—"The unanimous Declaration of the thirteen United States of America." And here again, that there might be no doubt how these States would stand to each other in the new condition in which they were about to be placed, it concluded by declaring,—"that these United Colonies are, and of right ought to be, free and independent States;" "and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, and to do all other acts and things which independent States may of right do." The "United States" is,

then, the baptismal name of these States,—received at their birth ;—by which they have ever since continued to call themselves; by which they have characterized their constitution, government and laws; —and by which they are known to the rest of the world.

The retention of the same style, throughout every stage of their existence, affords strong, if not conclusive evidence that the political relation between these States, under their present constitution and government, is substantially the same as under the confederacy and revolutionary government; and what that relation was, we are not left to doubt; as they are declared expressly to be "*free*, *independent* and *sovereign* States." They, then, are now united, and have been, throughout, simply as confederated States. If it had been intended by the members of the convention which framed the present constitution and government, to make any essential change, either in the relation of the States to each other, or the basis of their union, they would, by retaining the style which designated them under the preceding governments, have practised a deception, utterly unworthy of their character, as sincere and honest men and patriots. It may, therefore, be fairly inferred, that, retaining the same style, they intended to attach to the expression,—"the United States," the same meaning, substantially, which it previously had; and, of course, in calling the present government,—"the federal government of these States," they meant by "federal," that they stood in the same relation to each other,—that their union rested,

without material change, on the same basis,—as under the confederacy and the revolutionary government; and that federal, and confederated States, meant substantially the same thing. It follows, also, that the changes made by the present constitution were not in the foundation, but in the superstructure of the system. We accordingly find, in confirmation of this conclusion, that the convention, in their letter to Congress, stating the reasons for the changes that had been made, refer only to the necessity which required a different "*organization*" of the government, without making any allusion whatever to any change in the relations of the States towards each other,—or the basis of the system. They state that, "the friends of our country have long seen and desired, that the power of making war, peace, and treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the Government of the Union: but the impropriety of delegating such extensive trusts to one body of men is evident; hence results the necessity of a *different organization*." Comment is unnecessary.

We thus have the authority of the convention itself for asserting that the expression, "United States," has essentially the same meaning, when applied to the present constitution and government, as it had previously; and, of course, that the States have retained their separate existence, as independent and sovereign communities, in all the forms of political existence, through which they have passed. Such, indeed, is the literal import of the expression,

—"the United States,"—and the sense in which it is ever used, when it is applied politically.—I say, *politically*,—because it is often applied, *geographically*, to designate the portion of this continent occupied by the States composing the Union, including territories belonging to them. This application arose from the fact, that there was no appropriate term for that portion of this continent; and thus, not unnaturally, the name by which these States are politically designated, was employed to designate the region they occupy and possess. The distinction is important, and cannot be overlooked in discussing questions involving the character and nature of the government, without causing great confusion and dangerous misconceptions.

But as conclusive as these reasons are to prove that the government of the United States is federal, in contradistinction to national, it would seem, that they have not been sufficient to prevent the opposite opinion from being entertained. Indeed, this last seems to have become the prevailing one; if we may judge from the general use of the term "national," and the almost entire disuse of that of "federal." National, is now commonly applied to "the general government of the Union,"—and "the federal government of these States,"—and all that appertains to them or to the Union. It seems to be forgotten that the term was repudiated by the convention, after full consideration; and that it was carefully excluded from the constitution, and the letter laying it before Congress. Even those who know all this,—and, of course, how falsely the term

is applied,—have, for the most part, slided into its use without reflection. But there are not a few who so apply it, because they believe it to be a national government in fact; and among these are men of distinguished talents and standing, who have put forth all their powers of reason and eloquence, in support of the theory. The question involved is one of the first magnitude, and deserves to be investigated thoroughly in all its aspects. With this impression, I deem it proper,—clear and conclusive as I regard the reasons already assigned to prove its federal character,—to confirm them by historical references; and to repel the arguments adduced to prove it to be a national government. I shall begin with the formation and ratification of the constitution.

That the States, when they formed and ratified the constitution, were distinct, independent, and sovereign communities, has already been established. That the people of the several States, acting in their separate, independent, and sovereign character, adopted their separate State constitutions, is a fact uncontested and incontestable; but it is not more certain than that, acting in the same character, they ratified and adopted the constitution of the United States; with this difference only, that in making and adopting the one, they acted without concert or agreement; but, in the other, with concert in making, and mutual agreement in adopting it. That the delegates who constituted the convention which framed the constitution, were appointed by the several States, each on its own

authority; that they voted in the convention by States; and that their votes were counted by States, —are recorded and unquestionable facts. So, also, the facts that the constitution, when framed, was submitted to the people of the several States for their respective ratification; that it was ratified by them, each for itself; and that it was binding on each, only in consequence of its being so ratified by it. Until then, it was but the plan of a constitution, without any binding force. It was the act of ratification which established it as a constitution between the States ratifying it; and only between *them*, on the condition that not less than nine of the then thirteen States should concur in the ratification; —as is expressly provided by its seventh and last article. It is in the following words: "The ratification of the conventions of nine States shall be sufficient for the establishment of this constitution between the States so ratifying the same." If additional proof be needed to show that it was only binding between the States that ratified it, it may be found in the fact, that two States, North Carolina and Rhode Island, refused, at first, to ratify; and were, in consequence, regarded in the interval as foreign States, without obligation, on their parts, to respect it, or, on the part of their citizens, to obey it. Thus far, there can be no difference of opinion. The facts are too recent and too well established,— and the provision of the constitution too explicit, to admit of doubt.

That the States, then, retained, after the ratification of the constitution, the distinct, independent,

and sovereign character in which they formed and ratified it, is certain; unless they divested themselves of it by the act of ratification, or by some provision of the constitution. If they have not, the constitution must be federal, and not national; for it would have, in that case, every attribute necessary to constitute it federal, and not one to make it national. On the other hand, if they have divested themselves, then it would necessarily lose its federal character, and become national. Whether, then, the government is federal or national, is reduced to a single question; whether the act of ratification, of itself, or the constitution, by some one, or all of its provisions, did, or did not, divest the several States of their character of separate, independent, and sovereign communities, and merge them all in one great community or nation, called the American people?

Before entering on the consideration of this important question, it is proper to remark, that, on its decision, the character of the government, as well as the constitution, depends. The former must, necessarily, partake of the character of the latter, as it is but its agent, created by it, to carry its powers into effect. Accordingly, then, as the constitution is federal or national, so must the government be; and I shall, therefore, use them indiscriminately in discussing the subject.

Of all the questions which can arise under our system of government, this is by far the most important. It involves many others of great magnitude; and among them, that of the allegiance of the citi-

zen; or, in other words, the question to whom allegiance and obedience are ultimately due. What is the true relation between the two governments,—that of the United States, and those of the several States? and what is the relation between the individuals respectively composing them? For it is clear, if the States still retain their sovereignty as separate and independent communities, the allegiance and obedience of the citizens of each would be due to their respective States; and that the government of the United States and those of the several States would stand as equals and co-ordinates in their respective spheres; and, instead of being united socially, their citizens would be politically connected through their respective States. On the contrary, if they have, by ratifying the constitution, divested themselves of their individuality and sovereignty, and merged themselves into one great community or nation, it is equally clear, that the sovereignty would reside in the whole,—or what is called the American people; and that allegiance and obedience would be due to them. Nor is it less so, that the government of the several States would, in such case, stand to that of the United States, in the relation of inferior and subordinate, to superior and paramount; and that the individuals of the several States, thus fused, as it were, into one general mass, would be united *socially*, and not *politically*. So great a change of condition would have involved a thorough and radical revolution, both socially and politically,—a revolution much more radical, indeed, than that which followed the Declaration of Independence.

They who maintain that the ratification of the constitution effected so mighty a change, are bound to establish it by the most demonstrative proof. The presumption is strongly opposed to it. It has already been shown, that the authority of the convention which formed the constitution is clearly against it; and that the history of its ratification, instead of supplying evidence in its favor, furnishes strong testimony in opposition to it. To these, others may be added; and, among them, the presumption drawn from the history of these States, in all the stages of their existence down to the time of the ratification of the constitution. In all, they formed separate, and, as it respects each other, independent communities; and were ever remarkable for the tenacity with which they adhered to their rights as such. It constituted, during the whole period, one of the most striking traits in their character,—as a very brief sketch will show.

During their colonial condition, they formed distinct communities,—each with its separate charter and government,—and in no way connected with each other, except as dependent members of a common empire. Their first union amongst themselves was, in resistance to the encroachments of the parent country on their chartered rights,—when they adopted the title of,—"the United Colonies." Under that name they acted, until they declared their independence;—always, in their joint councils, voting and acting as separate and distinct communities;—and not in the aggregate, as composing one community or nation. They acted in the same character in

declaring independence; by which act they passed from their dependent, colonial condition, into that of free and sovereign States. The declaration was made by delegates appointed by the several colonies, each for itself, and on its own authority. The vote making the declaration was taken by delegations, each counting one. The declaration was announced to be unanimous, not because every delegate voted for it, but because the majority of each delegation did; showing clearly, that the body itself, regarded it as the united act of the several colonies, and not the act of the whole as one community. To leave no doubt on a point so important, and in reference to which the several colonies were so tenacious, the declaration was made in the name, and by the authority of the people of the colonies, represented in Congress; and that was followed by declaring them to be,—"free and independent States." The act was, in fact, but a formal and solemn annunciation to the world, that the colonies had ceased to be dependent communities, and had become free and independent States; without involving any other change in their relations with each other, than those necessarily incident to a separation from the parent country. So far were they from supposing, or intending that it should have the effect of merging their existence, as separate communities, into one nation, that they had appointed a committee,—which was actually sitting, while the declaration was under discussion,—to prepare a plan of a confederacy of the States, preparatory to entering into their new condition. In fulfilment of their appointment, this

committee prepared the draft of the articles of confederation and perpetual union, which afterwards was adopted by the governments of the several States. That it instituted a mere confederacy and union of the States has already been shown. That, in forming and assenting to it, the States were exceedingly jealous and watchful in delegating power, even to a confederacy : that they granted the powers delegated most reluctantly and sparingly; that several of them long stood out, under all the pressure of the revolutionary war, before they acceded to it; and that, during the interval which elapsed between its adoption and that of the present constitution, they evinced, under the most urgent necessity, the same reluctance and jealousy, in delegating power,—are facts which cannot be disputed.

To this may be added another circumstance of no little weight, drawn from the preliminary steps taken for the ratification of the constitution. The plan was laid, by the convention, before the Congress of the confederacy, for its consideration and action, as has been stated. It was the sole organ and representative of these States in their confederated character. By submitting it, the convention recognized and acknowledged its authority over it, as the organ of distinct, independent, and sovereign States. It had the right to dispose of it as it pleased; and, if it had thought proper, it might have defeated the plan by simply omitting to act on it. But it thought proper to act, and to adopt the course recommended by the convention;—which was, to submit it,—"to a convention of dele-

gates, chosen in each State, by the people thereof, for their assent and adoption." All this was in strict accord with the federal character of the constitution, but wholly repugnant to the idea of its being national. It received the assent of the States in all the possible modes in which it could be obtained: first,—in their confederated character, through its only appropriate organ, the Congress; next, in their individual character, as separate States, through their respective State governments, to which the Congress referred it; and finally, in their high character of independent and sovereign communities, through a convention of the people, called in each State, by the authority of its government. The States acting in these various capacities, might, at every stage, have defeated it or not, at their option, by giving or withholding their consent.

With this weight of presumptive evidence, to use no stronger expression, in favor of its federal, in contradistinction to its national character, I shall next proceed to show, that the ratification of the constitution, instead of furnishing proof against, contains additional and conclusive evidence in its favor.

We are not left to conjecture, as to what was meant by the ratification of the constitution, or its effects. The expressions used by the conventions of the States, in ratifying it, and those used by the constitution in connection with it, afford ample means of ascertaining with accuracy, both its meaning and effect. The usual form of expression used by the former is:—"We, the delegates of the

State," (naming the State,) "do, in behalf of the people of the State, assent to, and ratify the said constitution." All use, "ratify,"—and all, except North Carolina, use, "assent to." The delegates of that State use, "adopt," instead of "assent to;" a variance merely in the form of expression, without, in any degree, affecting the meaning. Ratification was, then, the act of the several States in their separate capacity. It was performed by delegates appointed expressly for the purpose. Each appointed its own delegates; and the delegates of each, acted in the name of, and for the State appointing them. Their act consisted in, "assenting to," or, what is the same thing, "adopting and ratifying" the constitution.

By turning to the seventh article of the constitution, and to the preamble, it will be found what was the effect of ratifying. The article expressly provides, that, "the ratification of the conventions of nine States, shall be sufficient for the establishment of this constitution, between the States so ratifying the same." The preamble of the constitution is in the following words;—"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." The effect, then, of its ratification was, to ordain and establish the constitution;—and, thereby, to make, what was before but a plan,—"The constitu-

tion of the United States of America." All this is clear.

It remains now to show, *by whom*, it was ordained and established; *for whom*, it was ordained and established; *for what*, it was ordained and established; and *over whom*, it was ordained and established. These will be considered in the order in which they stand.

Nothing more is necessary, in order to show by whom it was ordained and established, than to ascertain who are meant by,—"We, the people of the United States;" for, by their authority, it was done. To this there can be but one answer:—it meant the people who ratified the instrument; for it was the act of ratification which ordained and established it. Who they were, admits of no doubt. The process preparatory to ratification, and the acts by which it was done, prove, beyond the possibility of a doubt, that it was ratified by the several States, through conventions of delegates, chosen in each State by the people thereof; and acting, each in the name and by the authority of its State: and, as all the States ratified it,—"We, the people of the United States,"—mean,—We, the people of the several States of the Union. The inference is irresistible. And when it is considered that the States of the Union were then members of the confederacy,—and that, by the express provision of one of its articles, "each State retains its sovereignty, freedom, and independence," the proof is demonstrative, that,—"We, the people of the United States of America," mean the people of the several States of the Union,

acting as free, independent, and sovereign States. This strikingly confirms what has been already stated; to wit, that the convention which formed the constitution, meant the same thing by the terms, —"United States,"—and, "federal,"—when applied to the constitution or government;—and that the former, when used politically, always mean,—these States united as independent and sovereign communities.

Having shown, *by whom*, it was ordained, there will be no difficulty in determining, *for whom*, it was ordained. The preamble is explicit;—it was ordained and established for,—"The United States of America;" adding, "America," in conformity to the style of the then confederacy, and the Declaration of Independence. Assuming, then, that the "United States" bears the same meaning in the conclusion of the preamble, as it does in its commencement, (and no reason can be assigned why it should not,) it follows, necessarily, that the constitution was ordained and established *for* the people of the several States, *by* whom it was ordained and established.

Nor will there be any difficulty in showing, *for what*, it was ordained and established. The preamble enumerates the objects. They are,—"to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." To effect these objects, they ordained and established, to use their own language,—"the constitution for the United States of America;"—clearly meaning by

"for," that it was intended to be *their* constitution; and that the objects of ordaining and establishing it were, to perfect *their* union, to establish justice among *them*—to insure *their* domestic tranquillity, to provide for *their* common defence and general welfare, and to secure the blessings of liberty to *them* and *their* posterity. Taken all together, it follows, from what has been stated, that the constitution was ordained and established *by* the several States, as *distinct, sovereign communities;* and that it was ordained and established by them for *themselves*—for their common welfare and safety, as *distinct and sovereign communities.*

It remains to be shown, *over whom*, it was ordained and established. That it was not over *the several States*, is settled by the seventh article beyond controversy. It declares, that the ratification by nine States shall be sufficient to establish the constitution between the States so ratifying. "Between," necessarily excludes "*over*;"—as that which is *between* States cannot be *over* them. Reason itself, if the constitution had been silent, would have led, with equal certainty, to the same conclusion. For it was the several States, or, what is the same thing, their people, in their sovereign capacity, who ordained and established the constitution. But the authority which ordains and establishes, is higher than that which is ordained and established; and, of course, the latter must be subordinate to the former; —and cannot, therefore, be *over* it. "Between," always means more than over;—and implies in this case, that the authority which ordained and estab-

lished the constitution, was the joint and united authority of the States ratifying it; and that, among the effects of their ratification, it became a contract between them; and, *as a compact*, binding on them; —but only as such. In that sense the term, "between," is appropriately applied. In no other, can it be. It was, doubtless, used in that sense in this instance; but the question still remains, *over whom*, was it ordained and established? After what has been stated, the answer may be readily given. It was *over the government* which it created, and all its functionaries in their official character,—and the individuals composing and inhabiting the several States, as far as they might come within the sphere of the powers delegated to the United States.

I have now shown, conclusively, by arguments drawn from the act of ratification, and the constitution itself, that the several States of the Union, acting in their confederated character, ordained and established the constitution; that they ordained and established it for themselves, in the same character; that they ordained and established it for their welfare and safety, in the like character; that they established it as a compact *between* them, and not as a constitution *over* them; and that, as a compact, they are parties to it, in the same character. I have thus established, conclusively, that these States, in ratifying the constitution, did not lose the confederated character which they possessed when they ratified it, as well as in all the preceding stages of their existence; but, on the contrary, still retained it to the full.

Those who oppose this conclusion, and maintain the national character of the government, rely, in support of their views, mainly on the expressions, "we, the people of the United States," used in the first part of the preamble; and, "do ordain and establish this constitution for the United States of America," used in its conclusion. Taken together, they insist, in the first place, that, "we, the people," mean, the people in their individual character, as forming a single community; and that, "the United States of America," designates them in their aggregate character, as the American people. In maintaining this construction, they rely on the omission to enumerate the States by name, after the word "people," (so as to make it read, "We, the people of New Hampshire, Massachusetts, &c.," as was done in the articles of the confederation, and, also, in signing the Declaration of Independence;)—and, instead of this, the simple use of the general term "United States."

However plausible this may appear, an explanation perfectly satisfactory may be given, why the expression, as it now stands, was used by the framers of the constitution; and why it should not receive the meaning attempted to be placed upon it. It is conceded that, if the enumeration of the States after the word, "people," had been made, the expression would have been freed from all ambiguity; and the inference and argument founded on the failure to do so, left without pretext or support. The omission is certainly striking, but it can be readily explained. It was made intentionally, and solely

from the necessity of the case. The first draft of the constitution contained an enumeration of the States, by name, after the word "people;" but it became impossible to retain it after the adoption of the seventh and last article, which provided, that the ratification by nine States should be sufficient to establish the constitution as between *them;* and for the plain reason, that it was impossible to determine, whether all the States would ratify;—or, if any failed, which, and how many of the number; or, if nine should ratify, how to designate them. No alternative was thus left but to omit the enumeration, and to insert the "United States of America," in its place. And yet, an omission, so readily and so satisfactorily explained, has been seized on, as furnishing strong proof that the government was ordained and established by the American people, in the aggregate,—and is therefore national.

But the omission, of itself, would have caused no difficulty, had there not been connected with it a twofold ambiguity in the expression as it now stands. The term "*United States,*" which always means, in constitutional language, the several States in their confederated character, means also, as has been shown, when applied geographically, the country occupied and possessed by them. While the term "people," has, in the English language, no plural, and is necessarily used in the singular number, even when applied to many communities or states confederated in a common union,—as is the case with the United States. Availing themselves of this double ambiguity, and the omission to enumerate the States

by name, the advocates of the national theory of the government, assuming that, "*we, the people*," meant individuals generally, and not people as forming States; and that "*United States*" was used in a geographical and not a political sense, made out an argument of some plausibility, in favor of the conclusion that, "we, the people of the United States of America," meant the aggregate population of the States regarded *en masse*, and not in their distinctive character as forming separate political communities. But in this gratuitous assumption, and the conclusion drawn from it, they overlooked the stubborn fact, that the very people who ordained and established the constitution, are identically the same who ratified it; for it was by the act of ratification alone, that it was ordained and established,—as has been conclusively shown. This fact, of itself, sweeps away every vestige of the argument drawn from the ambiguity of those terms, as used in the preamble.

They next rely, in support of their theory, on the expression,—"ordained and established this constitution." They admit that the constitution, in its incipient state, assumed the form of a compact; but contend that, "ordained and established," as applied to the constitution and government, are incompatible with the idea of compact; that, consequently, the instrument or plan lost its federative character when it was ordained and established as a constitution; and, thus, the States ceased to be parties to a compact, and members of a confederated union, and became fused into one common community, or nation, as subordinate and dependent divisions or corporations.

I do not deem it necessary to discuss the question whether there is any incompatibility between the terms,—"ordained and established,"—and that of "compact," on which the whole argument rests; although it would be no difficult task to show that it is a gratuitous assumption, without any foundation whatever for its support. It is sufficient for my purpose, to show, that the assumption is wholly inconsistent with the constitution itself;—as much so, as the conclusion drawn from it has been shown to be inconsistent with the opinion of the convention which formed it. Very little will be required, after what has been already stated, to establish what I propose.

That the constitution regards itself in the light of a compact, still existing between the States, after it was ordained and established; that it regards the union, then existing, as still existing; and the several States, of course, still members of it, in their original character of confederated States, is clear. Its seventh article, so often referred to, in connection with the arguments drawn from the preamble, sufficiently establishes all these points, without adducing others; except that which relates to the continuance of the union. To establish this, it will not be necessary to travel out of the preamble and the letter of the convention, laying the plan of the constitution before the Congress of the confederation. In enumerating the objects for which the constitution was ordained and established, the preamble places at the head of the rest, as its leading object,—"to form a more perfect union." So far, then, are the

terms,—"ordained and established," from being incompatible with the union, or having the effect of destroying it, the constitution itself declares that it was intended, "to form a more perfect union." This, of itself, is sufficient to refute the assertion of their incompatibility. But it is proper here to remark, that it could not have been intended, by the expression in the preamble,—"to form a more perfect union,"—to declare, that the old was abolished, and a new and more perfect union established in its place: for we have the authority of the convention which formed the constitution, to prove that their object was to continue the then existing union. In their letter, laying it before Congress, they say,—"In all our deliberations on this subject, we kept steadily in our view, that which appears to us, the greatest interest of every true American, the consolidation of our union." "Our union," can refer to no other than the then existing union,—the old union of the confederacy, and of the revolutionary government which preceded it,—of which these States were confederated members. This must, of course, have been the union to which the framers referred in the preamble. It was this, accordingly, which the constitution intended to make more perfect; just as the confederacy made more perfect, that of the revolutionary government. Nor is there any thing in the term, "consolidation," used by the convention, calculated to weaken the conclusion. It is a strong expression; but as strong as it is, it certainly was not intended to imply the destruction of the union, as it is supposed to do by the advocates

of a national government; for that would have been incompatible with the context, as well as with the continuance of the union,—which the sentence and the entire letter imply. Interpreted, then, in conjunction with the expression used in the preamble,—"to form a more perfect union,"—although it may more strongly intimate closeness of connection; it can imply nothing incompatible with the professed object of perfecting the union,—still less a meaning and effect wholly inconsistent with the nature of a confederated community. For to adopt the interpretation contended for, to its full extent, would be to *destroy* the union, and not to consolidate and perfect it.

If we turn from the preamble and the ratifications, to the body of the constitution, we shall find that it furnishes most conclusive proof that the government is federal, and not national. I can discover nothing, in any portion of it, which gives the least countenance to the opposite conclusion. On the contrary, the instrument, in all its parts, repels it. It is, throughout, federal. It every where recognizes the existence of the States, and invokes their aid to carry its powers into execution. In one of the two houses of Congress, the members are elected by the legislatures of their respective States; and in the other, by the people of the several States, not as composing mere districts of one great community, but as distinct and independent communities. General Washington vetoed the first act apportioning the members of the House of Representatives among the several States, under the first cen-

sus, expressly on the ground, that the act assumed as its basis, the former, and not the latter construction. The President and Vice-President are chosen by electors, appointed by their respective States; and, finally, the Judges are appointed by the President and the Senate; and, of course, as these are elected by the States, they are appointed through their agency.

But, however strong be the proofs of its federal character derived from this source, that portion which provides for the amendment of the constitution, furnishes, if possible, still stronger. It shows, conclusively, that the people of the several States still retain that supreme ultimate power, called sovereignty;—the power by which they ordained and established the constitution; and which can rightfully create, modify, amend, or abolish it, at its pleasure. Wherever this power resides, there the sovereignty is to be found. That it still continues to exist in the several States, in a modified form, is clearly shown by the fifth article of the constitution, which provides for its amendment. By its provisions, Congress may propose amendments, on its own authority, by the vote of two-thirds of both houses; or it may be compelled to call a convention to propose them, by two-thirds of the legislatures of the several States: but, in either case, they remain, when thus made, mere proposals of no validity, until adopted by three-fourths of the States, through their respective legislatures; or by conventions, called by them, for the purpose. Thus far, the several States, in ordaining and establishing the constitu-

tion, agreed, for their mutual convenience and advantage, to modify, by compact, their high sovereign power of creating and establishing constitutions, as far as it related to the constitution and government of the United States. I say, for their mutual convenience and advantage; for without the modification, it would have required the separate consent of all the States of the Union to alter or amend their constitutional compact; in like manner as it required the consent of all to establish it between them; and to obviate the almost insuperable difficulty of making such amendments as time and experience might prove to be necessary, by the unanimous consent of all, they agreed to make the modification. But that they did not intend, by this, to divest themselves of the high sovereign right, (a right which they still retain, notwithstanding the modification,) to change or abolish the present constitution and government at their pleasure, cannot be doubted. It is an acknowledged principle, that sovereigns may, by compact, modify or qualify the exercise of their power, without impairing their sovereignty; of which, the confederacy existing at the time, furnishes a striking illustration. It must reside, unimpaired and in its plentitude, somewhere. And if it do not reside in the people of the several States, in their confederated character, where,—so far as it relates to the constitution and government of the United States,—can it be found? Not, certainly, in the government; for, according to our theory, sovereignty resides in the people, and not in the government. That it cannot

be found in the people, taken in the aggregate, as forming one community or nation, is equally certain. But as certain as it cannot, just so certain is it, that it must reside in the people of the several States: and if it reside in them at all, it must reside in them as separate and distinct communities; for it has been shown, that it does not reside in them in the aggregate, as forming one community or nation. These are the only aspects under which it is possible to regard the people; and, just as certain as it resides in them, in that character, so certain is it that ours is a federal, and not a national government.

The theory of the nationality of the government, is, in fact, founded on fiction. It is of recent origin. Few, even yet, venture to avow it to its full extent; while they entertain doctrines, which spring from, and must necessarily terminate in it. They admit that the people of the several States form separate, independent, and sovereign communities;—and that, to this extent, the constitution is federal; but beyond this, and to the extent of the delegated powers,—regarding them as forming one people or nation, they maintain that the constitution is national.

Now, unreasonable as is the theory that it is wholly national, this, if possible, is still more so; for the one, although against reason and recorded evidence, is possible; but the other, while equally against both, is absolutely impossible. It involves the absurdity of making the constitution federal in reference to a class of powers, which are expressly

excluded from it; and, by consequence, from the compact itself, into which the several States entered when they established it. The term, "federal," implies a league,—and this, a compact between sovereign communities; and, of course, it is impossible for the States to be federal, in reference to powers expressly reserved to them in their character of separate States, and not included in the compact. If the States are national at all,—or, to express it more definitely,—if they form a NATION at all, it must be in reference to the delegated, and not the reserved powers. But it has already been established that, as to these, they have no such character—no such existence. It is, however, proper to remark, that while it is impossible for them to be federal, as to their reserved powers, they could not be federal without them. For had all the powers of government been delegated, the separate constitutions and governments of the several States would have been superseded and destroyed; and what is now called the constitution and government of the United States, would have become the sole constitution and government of the whole:—the effect of which, would have been to supersede and destroy the States themselves. The people respectively composing them, instead of constituting political communities, having appropriate organs to will and to act,—which is indispensable to the existence of a State,—would, in such case, be divested of all such organs; and, by consequence, reduced into an unorganized mass of individuals,—as far as related to the respective States,—and merged into one com-

munity or nation, having but one constitution and government as the organ, through which to will and to act. The idea, indeed, of a federal constitution and government, necessarily implies reserved and delegated powers,—powers reserved in part, to be exercised exclusively by the States in their original separate character;—and powers delegated, by mutual agreement, to be exercised jointly by a common council or government. And hence, consolidation and disunion are, equally, destructive of such government;—one by merging the States composing the Union into one community or nation; and the other, by resolving them into their original elements, as separate and disconnected States.

It is difficult to imagine how a doctrine so perfectly absurd, as that the States are federal as to the reserved, and national as to the delegated powers, could have originated; except through a misconception of the meaning of certain terms, sometimes used to designate the latter. They are sometimes called *granted* powers; and at others, are said to be powers *surrendered* by the States. When these expressions are used without reference to the fact, that all powers, under our system of government, are trust powers, they imply that the States have parted with such as are said to be granted or surrendered, absolutely and irrecoverably. The case is different when applied to them as trust powers. They then become identical, in their meaning, with delegated powers; for to grant a power in trust, is what is meant by delegating it. It is not, therefore, surprising, that they who do not bear in mind that all

powers of government are, with us, trust powers, should conclude that the powers said to be granted and surrendered by the States, are absolutely transferred from them to the government of the United States,—as is sometimes alleged,—or to the people as constituting one nation, as is more usually understood ;—and, thence, to infer that the government is national to the extent of the granted powers.

But that such inference and conclusion are utterly unwarrantable,—that the powers in the constitution called granted powers, are, in fact, delegated powers,—powers granted in trust,—and not absolutely transferred,—we have, in addition to the reasons just stated, the clear and decisive authority of the constitution itself. Its tenth amended article provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In order to understand the full force of this provision, it is necessary to state that this is one of the amended articles, adopted at the recommendation of several of the conventions of the States, contemporaneously with the ratification of the constitution,—in order to supply what were thought to be its defects;—and to guard against misconceptions of its meaning. It is admitted, that its principal object was to prevent the reserved from being drawn within the sphere of the granted powers, by the force of construction,—a danger, which, at the time, excited great, and, as experience has proved, just apprehension. But in guarding against this danger, care was

also taken to guard against others,—and among them, against mistakes, as to whom powers were granted, and to whom they were reserved. The former was done by using the expression, "the powers not delegated to the United States," which, by necessary implication means, that the powers granted are delegated to them in their confederated character;—and the latter, by the remaining portion of the article, which provides that such powers "are reserved to the States respectively, or to the people;"—meaning clearly by, "respectively," that the reservation was to the several States and people in their separate character, and not to the whole, as forming one people or nation. They thus repudiate nationality, applied either to the delegated or to reserved powers.

But it may be asked,—why was the reservation made both to the States and to the people? The answer is to be found in the fact, that, what are called, "reserved powers," in the constitution of the United States, include all powers not delegated to Congress by it,—or prohibited by it to the States. The powers thus designated are divided into two distinct classes;—those delegated by the people of the several States to their separate State governments, and those which they still retain,—not having delegated them to either government. Among them is included the high sovereign power, by which they ordained and established both; and by which they can modify, change or abolish them at pleasure. This, with others not delegated, are those which are reserved to the people of the several States respectively.

But the article in its precaution, goes further;—and takes care to guard against the term, "granted," used in the first article and first section of the constitution, which provides that, "all legislative powers herein *granted*, shall be vested in a Congress of the United States;"—as well as against other terms of like import used in other parts of the instrument. It guarded against it, indirectly, by substituting, "delegated," in the place of "granted;—and instead of declaring that the powers not "granted," are reserved, it declares that the powers not "delegated," are reserved. Both terms,—"granted," used in the constitution as it came from its framers, and "delegated," used in the amendments,—evidently refer to the same class of powers; and no reason can be assigned, why the amendment substituted "delegated," in the place of "granted," but to free it from its ambiguity, and to provide against misconstruction.

It is only by considering the granted powers, in their true character of trust or delegated powers, that all the various parts of our complicated system of government can be harmonized and explained. Thus regarded, it will be easy to perceive how the people of the several States could grant certain powers to a joint,—or, as its framers called it,—a general government, in trust, to be exercised for their common benefit, without an absolute surrender of them;—or without impairing their independence and sovereignty. Regarding them in the opposite light, as powers absolutely surrendered and irrevocably transferred, inexplicable difficulties pre-

sent themselves. Among the first, is that which springs from the idea of divided sovereignty; involving the perplexing question,—how the people of the several States can be partly sovereign, and partly, *not* sovereign,—sovereign as to the reserved, —and not sovereign, as to the delegated powers? There is no difficulty in understanding how powers, appertaining to sovereignty, may be divided; and *the exercise* of one portion delegated to one set of agents, and another portion to another: or how sovereignty may be vested in one man, or in a few, or in many. But how sovereignty itself—the supreme power—can be divided,—how the people of the several States can be partly sovereign, and partly *not* sovereign—partly supreme, and partly *not* supreme, it is impossible to conceive. Sovereignty is an entire thing;—to divide, is,— to destroy it.

But suppose this difficulty surmounted;—another not less perplexing remains. If sovereignty be surrendered and transferred, in part or entirely, by the several States, it must be transferred to somebody; and the question is, to whom? Not, certainly, to the government,—as has been thoughtlessly asserted by some; for that would subvert the fundamental principle of our system,—that sovereignty resides in the people. But if not to the government, it must be transferred,—if at all,—to the people, regarded in the aggregate, as a nation. But this is opposed, not only by a force of reason which cannot be resisted, but by the preamble and tenth amended article of the constitution, as has just been shown. If then it be transferred neither to the one

nor the other, it cannot be transferred at all; as it is impossible to conceive to whom else the transfer could have been made. It must, therefore, and of course, remain unsurrendered and unimpaired in the people of the several States;—to whom, it is admitted, it appertained when the constitution was adopted.

Having now established that the powers delegated to the United States, were delegated to them in their confederated character, it remains to be explained in what sense they were thus delegated. The constitution here, as in almost all cases, where it is fairly interpreted, furnishes the explanation necessary to expel doubt. Its first article, already cited, affords it in this case. It declares that "all legislative power herein granted (delegated), shall be vested in the Congress of the United States;" that is, in the Congress for the time being. It also declares, that "the executive power shall be vested in the President of the United States;"—and that "the judicial power shall be vested in a Supreme Court, and such inferior courts, as Congress may, from time to time, ordain and establish." They are then delegated to the United States, by vesting them in the respective departments of the government, to which they appropriately belong; to be exercised by the government of the United States, as their joint agent and representative, in their confederated character. It is, indeed, difficult to conceive how else it could be delegated to them;—or in what other way they could mutually participate in the exercise of the powers delegated. It has, indeed,

been construed by some to mean, that each State, reciprocally and mutually, delegated to each other, the portion of its sovereignty embracing the delegated powers. But besides the difficulty of a divided sovereignty, which it would involve, the expression, "delegated powers," repels that construction. If, however, there should still remain a doubt, the articles of confederation would furnish conclusive proof of the truth of that construction which I have placed upon the constitution; and, also, that not a particle of sovereignty was intended to be transferred, by delegating the powers conferred on the different departments of the government of the United States. I refer to its second article,—so often referred to already. It declares, as will be remembered, that,—"each State retains its sovereignty, freedom, and independence; and every power, jurisdiction, and right, which is not, by this confederation, expressly delegated to the United States in Congress assembled." The powers delegated by it were, therefore, delegated, like those of the present constitution, to the *United States*. The only difference is, that "the United States," is followed, in the articles of confederation, by the words,—"in Congress assembled,"—which are omitted in the parallel expression in the amended article of the constitution. But this omission is supplied in it, by the first article, and by others of a similar character, already referred to; and by vesting the powers delegated to the United States, in the respective appropriate departments of the government. The reason of the difference is plain.

The constitution could not vest them in Congress alone;—because there were portions of the delegated powers vested also in the other departments of the government: while the articles of confederation could, with propriety, vest them in Congress;—as it was the sole representative of the confederacy. Nor could it vest them in the government of the United States; for that would imply that the powers were vested in the whole, as a unit;—and not, as the fact is, in its separate departments. The constitution, therefore, in borrowing this provision from the articles of confederation, adopted the mode best calculated to express the same thing that was expressed in the latter, by the words,—"in Congress assembled." That the articles of confederation, in delegating powers to the United States, did not intend to declare that the several States had parted with any portion of their sovereignty, is placed beyond doubt by the declaration contained in them, that,—"each State retains its sovereignty, freedom, and independence;" and it may be fairly inferred, that the framers of the constitution, in borrowing this expression, did not design that it should bear a different interpretation.

If it be possible still to doubt that the several States retained their sovereignty and independence unimpaired, strong additional arguments might be drawn from various other portions of the instrument;—especially from the third article, section third, which declares, that,—"treason against the United States, shall consist only in levying war against them or in adhering to their enemies, giving

them aid and comfort." It might be easily shown that,—"the United States,"—mean here,—as they do everywhere in the constitution,—the several States in their confederated character;—that treason against them, is treason against their joint sovereignty;—and, of course, as much treason against each State, as the act would be against any one of them, in its individual and separate character. But I forbear. Enough has already been said to place the question beyond controversy.

Having now established that the constitution is federal throughout, in contradistinction to national; and that the several States still retain their sovereignty and independence unimpaired, one would suppose that the conclusion would follow, irresistibly, in the judgment of all, that the government is also federal. But such is not the case. There are those, who admit the *constitution* to be entirely federal, but insist that the *government* is partly federal, and partly national. They rest their opinion on the authority of the "Federalist." That celebrated work comes to this conclusion, after explicitly admitting that the constitution was ratified and adopted by the people of the several States, and not by them as individuals composing one entire nation;—that the act establishing the constitution is, itself, a federal, and not a national act;—that it resulted neither from the act of a majority of the people of the Union, nor from a majority of the States; but from the unanimous assent of the several States;—differing no otherwise from their ordinary assent than as being given, not by their legis-

latures, but by the people themselves;—that they are parties to it;—that each State, in ratifying it, was considered as a sovereign body, independent of all others, and is bound only by its own voluntary act;—that, in consequence, the constitution itself is federal and not national;—that, if it had been formed by the people as one nation or community, the will of the majority of the whole people of the Union would have bound the minority;—that the idea of a national government involves in it, not only authority over individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government;—that among the people consolidated into one nation, this supremacy is completely vested in the government; that State governments, and all local authorities, are subordinate to it, and may be controlled, directed, or abolished by it at pleasure;—and, finally, that the States are regarded, by the constitution, as distinct, independent, and sovereign.*

How strange, after all these admissions, is the conclusion that the government is partly federal and partly national! It is the constitution which determines the character of the government. It is impossible to conceive how the constitution can be *exclusively* federal, (as it is admitted, and has been clearly proved to be,) and the government *partly* federal and *partly* national. It would be just as easy to conceive how a constitution can be exclusively monarchical, and the government partly

* See Federalist, Nos. 39 and 40.

monarchical, and partly aristocratic or popular; and *vice versa.* Monarchy is not more strongly distinguished from either, than a *federal* is from a *national* government. Indeed, these are even more adverse to each other; for the other forms may be blended in the constitution and the government; while, as has been shown, and as is indirectly admitted by the work referred to, the one of these so excludes the other, that it is impossible to blend them in the same constitution, and, of course, in the same government. I say, indirectly admitted, for it admits, that a federal government is one to which States are parties, in their distinct, independent, and sovereign character; and that,—"the idea of a national government involves in it, not only an authority over individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government;"—and, "that it is one, in which all local authorities are subordinate to the supreme, and may be controlled, directed, and abolished by it at pleasure." How, then, is it possible for institutions, admitted to be so utterly repugnant in their nature as to be directly destructive of each other, to be so blended as to form a government partly federal and partly national? What can be more contradictious? This, of itself, is sufficient to destroy the authority of the work on this point,—as celebrated as it is,—without showing, as might be done, that the admissions it makes throughout, are, in like manner, in direct contradiction to the conclusions, to which it comes.

But, strange as such a conclusion is, after such

admissions, it is not more strange than the reasons assigned for it. The first, and leading one,—that on which it mainly relies,—is drawn from the source whence, as it alleges, the powers of the government are derived. It states, that the House of Representatives will derive its powers from the people of "America;" and adds, by way of confirmation, "The people will be represented in the same proportion, and on the same principle, as they are in the legislatures of each particular State;"—and hence concludes that it would be national and not federal. Is the fact so? Does the House of Representatives really derive its powers from the people of America?—that is, from the people in the aggregate, as forming one nation; for such must be the meaning,—to give the least force, or even plausibility, to the assertion. Is it not a fundamental principle, and universally admitted—admitted even by the authors themselves,—that all the powers of the government are derived from the constitution,—including those of the House of Representatives, as well as others? And does not this celebrated work admit,—most explicitly, and in the fullest manner,—that the constitution derives all its powers and authority from the people of the several States, acting, each for itself, in their independent and sovereign character as States? that they still retain the same character, and, as such, are parties to it? and that it is a federal, and not a national, constitution? How, then, can it assert, in the face of such admissions, that the House of Representatives derives its authority from the American people, in the aggre-

gate, as forming one people or nation? To give color to the assertion, it affirms, that the people will be represented on the same principle, and in the same proportion, as they are in the legislature of each particular State. Are either of these propositions true? On the contrary, is it not universally known and admitted, that they are represented in the legislature of every State of the Union, as mere individuals,—and, by election districts, entirely subordinate to the government of the State;—while the members of the House of Representatives are elected—be the mode of election what it may—as delegates of the several States, in their distinct, independent, and sovereign character, as members of the Union,—and not as delegates from the States, considered as mere election districts? It was on this ground, as has been stated, that President Washington vetoed the act to apportion the members, under the first census, among the several States; and his opinion has, ever since, been acquiesced in.

Neither is it true that the people of each State are represented in the House of Representatives in the same proportion as in their respective legislatures. On the contrary, they are represented in the former according to one uniform ratio or proportion among the several States, fixed by the constitution itself;* while in each State legislature, the ratio, fixed by its separate State constitution, is different in different States;—and in scarcely any are they represented in the same proportion in the legisla-

* 1st Art., 2d Sec. of the Constitution.

ture, as in the House of Representatives. The only point of uniformity in this respect is, that "the electors of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the State legislatures;"* a rule which favors the federal, and not the national character of the government.

The authors of the work conclude, on the same affirmation,—and by a similar course of reasoning,—that the executive department of the government is partly national, and partly federal:—*federal*, so far as the number of electors of each State, in the election of President, depends on its Senatorial representation;—and so far as the final election, (when no choice is made by the electoral college,) depends on the House of Representatives,—because they vote and count by States:—and *national*, so far as the number of its electors depends on its representation in the Lower House. As the argument in support of this proposition is the same as that relied on to prove that the House of Representatives is national, I shall pass it by with a single remark.—It overlooks the fact that the electors, by an express provision of the constitution, are appointed by the several States;† and, of course, derive their powers from them. It would, therefore, seem, according to their course of reasoning, that the executive department, when the election is made by the colleges, ought to be regarded as *federal*;—while, on the other hand, when it is made by the

* 1st Art. 2d Sec. of the Con. † 2d Art. 1st Sec. of the Con.

House of Representatives, in the event of a failure on the part of the electors to make a choice, it ought to be regarded as *national*, and not federal, as they contend. It would, indeed, seem to involve a strange confusion of ideas to make the same department partly federal and partly national, on such a process of reasoning. It indicates a deep and radical error somewhere in the conception of the able authors of the work, in reference to a question the most vital that can arise under our system of government.

The next reason assigned is, that the government will operate on individuals composing the several States, and not on the States themselves. This, however, is very little relied on. It admits that even a confederacy may operate on individuals without losing its character as such,—and cites the articles of confederation in illustration; and it might have added, that mere treaties, in some instances, operate in the same way. It is readily conceded that one of the strongest characteristics of a confederacy is, that it usually operates on the states or communities which compose it, in their corporate capacity. When it operates on individuals, it departs, to that extent, from its appropriate sphere. But this is not the case with a federal government; —as will be shown when I come to draw the line of distinction between it and a confederacy. The argument, then, might be appropriate to prove that the government is not a confederacy,—but not that it is a national government. .

It next relies on the amending power to prove that it is partly national and partly federal. It

states that,—"were it wholly national, the supreme and ultimate authority would reside in a majority of the people of the whole Union; and this authority would be competent, at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to any alteration, that would be binding on all." It is remarkable how often this celebrated work changes its ground, as to what constitutes a national, and what a federal government;—and this, too, after defining them in the clearest and most precise manner. It tells us, in this instance, that were the government wholly national,—the supreme and ultimate authority would reside in the people of the Union; and, of course, such a government must derive its authority from that source. It tells us, elsewhere, that a federal government is one, to which the States, in their distinct, independent and sovereign character, are parties;—and, of course, such a government must derive its authority from them as its source. A government, then, to be partly one, and partly the other, ought, accordingly, to derive its authority partly from the one, and partly from the other; and no government could be so, which did not:—and yet we are told, at one time, that the constitution is federal, because it derived its authority, neither from the majority of the people of the Union, nor a majority of the States;—implying, of course, that a government, which derived its authority from a majority of the States, would be national; as well

as that which derived it from a majority of the people:—and, at another, that the election of the President by the House of Representatives would be a federal act;—although the House, itself, is national, because it derived its authority from the American people. And now we are told, that the amending power is partly national, because three fourths of the States, voting as States, without regard to population, can, instead of the whole, amend the constitution; although the vote of a majority of the House of Representatives, taken by States, made the election of the President, to that extent, federal. If we turn from this confusion of ideas, to its own clear conceptions of what makes a federal, and what a national government, nothing is more evident than that the amending power is not derived from, nor exercised under the authority of the people of the Union, regarded in the aggregate,—but from the several States, in their original, distinct and sovereign character; and that it is but a modification of the original creating power, by which the constitution was ordained and established,—and which required the consent of each State to make it a party to it;—and not a negation or inhibition of that power,—as has been shown. In support of these views, it endeavors to show, by reasons equally unsatisfactory and inconclusive, that the object of the convention which framed the constitution was, to establish, "a firm *national* government." To ascertain the powers and objects of the convention, reference ought to be made, one would suppose, to the commissions given to their respective delegates, by the several

States, which were represented in it. If that had been done, it would have been found that no State gave the slightest authority to its delegates to form a national government, or made the least allusion to such government as one of its objects. The word, *National*, is not even used in any one of the commissions. On the contrary, they designate the objects to be, to revise the federal constitution, and to make it adequate to the exigencies of the Union. But, instead of to these, the authors of this work resort to the act of Congress referring the proposition for calling a convention, to the several States, in conformity with the recommendation of the Annapolis convention;—which, of itself, could give no authority. And further,—even in this reference, they obviously rely, rather on the preamble of the act, than on the resolution adopted by Congress, submitting the proposition to the State governments. The preamble and resolution are in the following words:—"Whereas, there is a provision, in the articles of confederation and perpetual union, for making alterations therein, by the assent of a Congress of the United States and of the legislatures of the several States,—and whereas, experience has evinced that there are defects in the present confederation,—as a mean to the remedy of which, several of the States, and particularly the State of New-York, by express instruction to their delegates in Congress, have suggested a convention for the purpose expressed in the following resolution, and such convention appearing to be the most probable mean of establishing, in the States, a firm National Government,

Resolved, That, in the opinion of Congress, it is expedient that, on the second Monday of May next, a convention of delegates, who shall have been appointed by the several States, be held in Philadelphia, for the *sole* and *express* purpose of *revising the articles of confederation;* and reporting to Congress and the several legislatures, such *alterations* and *provisions therein* as shall render the *federal constitution* adequate to the exigencies of the government and the preservation of THE UNION."

Now, assuming that the mere opinion of Congress, and not the commissions of the delegates from the several States, ought to determine the object of the convention,—is it not manifest, that it is clearly in favor, not of establishing a firm national government, but of simply revising the articles of confederation for the purposes specified? Can any expression be more explicit than the declaration contained in the resolution, that the convention shall be held, "for the sole and express purpose of revising the articles of confederation?" If to this it be added, that the commissions of the delegates of the several States, accord with the resolution, there can be no doubt that the real object of the convention was,—(to use the language of the resolution,)—"to render the federal constitution adequate to the exigencies of the government and the preservation of the Union;" and not to establish a national constitution and government in its place:—and, that such was the impression of the convention itself, the fact, (admitted by the work,) that they did establish a federal, and not a national constitution, conclusively proves.

How the distinguished and patriotic authors of this celebrated work fell,—against their own clear and explicit admissions,—into an error so radical and dangerous,—one which has contributed, more than all others combined, to cast a mist over our system of government, and to confound and lead astray the minds of the community as to a true conception of its real character, cannot be accounted for, without adverting to their history and opinions as connected with the formation of the constitution. The two principal writers were prominent members of the convention; and leaders, in that body, of the party, which supported the plan for a national government. The other, although not a member, is known to have belonged to the same party. They all acquiesced in the decision, which overruled their favorite plan, and determined, patriotically, to give that adopted by the convention, a fair trial; without, however, surrendering their preference for their own scheme of a national government. It was in this state of mind, which could not fail to exercise a strong influence over their judgments, that they wrote the Federalist: and, on all questions connected with the character of the government, due allowance should be made for the force of the bias, under which their opinions were formed.

From all that has been stated, the inference follows, irresistibly, that the government is a federal, in contradistinction to a national government;—a government formed by the States; ordained and established by the States, and for the States;—without any participation or agency whatever, on the

part of the people, regarded in the aggregate as forming a nation; that it is throughout, in whole, and in every part, simply and purely federal,—"the federal government of these States,"—as is accurately and concisely expressed by General Washington, the organ of the convention, in his letter laying it before the old Congress;—words carefully selected, and with a full and accurate knowledge of their import. There is, indeed, no such community, *politically* speaking, as the people of the United States, regarded in the light of, and as constituting one people or nation. There never has been any such, in any stage of their existence; and, of course, they neither could, nor ever can exercise any agency, —or have any participation, in the formation of our system of government, or its administration. In all its parts,—including the federal as well as the separate State governments, it emanated from the same source,—the people of the several States. The whole, taken together, form a federal community;—a community composed of States united by a political compact;—and not a nation composed of individuals united by, what is called, a social compact.

I shall next proceed to show that it is federal, in contradistinction to a confederacy.

It differs and agrees, but in opposite respects, with a national government, and a confederacy. It differs from the former, inasmuch as it has, for its basis, a confederacy, and not a nation; and agrees with it in being a government: while it agrees with the latter, to the extent of having a confederacy for its basis, and differs from it, inasmuch as the

powers delegated to it are carried into execution by a government,—and not by a mere congress of delegates, as is the case in a confederacy. To be more full and explicit;—a federal government, though based on a confederacy, is, to the extent of the powers delegated, as much a government as a national government itself. It possesses, to this extent, all the authorities possessed by the latter, and as fully and perfectly. The case is different with a confederacy; for, although it is sometimes called a *government*,—its Congress, or Council, or the body representing it, by whatever name it may be called, is much more nearly allied to an assembly of diplomatists, convened to deliberate and determine how a league or treaty between their several sovereigns, for certain defined purposes, shall be carried into execution; leaving to the parties themselves, to furnish their quota of means, and to co-operate in carrying out what may have been determined on. Such was the character of the Congress of our confederacy; and such, substantially, was that of similar bodies in all confederated communities, which preceded our present government. Our system is the first that ever substituted a *government* in lieu of such bodies. This, in fact, constitutes its peculiar characteristic. It is new, peculiar, and unprecedented.

In asserting that such is the difference between our present government and the confederacy, which it superseded, I am supported by the authority of the convention which framed the constitution. It is to be found in the second paragraph of their let-

ter, already cited. After stating the great extent of powers, which it was deemed necessary to delegate to the United States,—or as they expressed it,—"the general government of the Union,"—the paragraph concludes in the following words: "But the impropriety of delegating such extensive trusts to one body of men, (the Congress of the confederacy,) is evident; and hence results the necessity of a different organization." This "different organization," consisted in substituting a *government* in place of the Congress of the confederation; and was, in fact, the great and essential change made by the convention. All others were, relatively, of little importance,—consisting rather in the modification of its language, and the mode of executing its powers, made necessary by it,—than in the powers themselves. The restrictions and limitations imposed on the powers delegated, and on the several States, are much the same in both. The change, though the only essential one, was, of itself, important, viewed in relation to the structure of the system; but it was much more so, when considered in its consequences as necessarily implying and involving others of great magnitude; as I shall next proceed to show.

It involved, in the first place, an important change in the source whence it became necessary to derive the delegated powers, and the authority by which the instrument delegating them should be ratified. Those of the confederacy were derived from the governments of the several States. They delegated them, and ratified the instrument by which

they were delegated, through their representatives in Congress assembled, and duly authorized for the purpose. It was, then, their work throughout; and their powers were fully competent to it. They possessed, as a confederate council, the power of making compacts and treaties, and of constituting the necessary agency to superintend their execution. The articles of confederation and union constituted, indeed, a solemn league or compact, entered into for the purposes specified; and Congress was but the joint agent or representative appointed to superintend its execution. But the governments of the several States could go no further, and were wholly deficient in the requisite power to form a constitution and government in their stead. That could only be done by the sovereign power; and that power, according to the fundamental principles of our system, resides, not in the government, but exclusively in the people,—who, with us, mean the people of the several States;—and hence, the powers delegated to the government had to be derived from them,—and the constitution to be ratified, and ordained and established by them. How this was done has already been fully explained.

It involved, in the next place, an important change in the character of the system. It had previously been, in reality, a league between the governments of the several States; or to express it more fully and accurately, between the States, *through the organs of their respective governments;* but it became a union, in consequence of being ordained and established between the people of the several States, by

themselves, and for themselves, in their character of sovereign and independent communities. It was this important change which (to use the language of the preamble of the constitution) "formed a more perfect union." It, in fact, perfected it. It could not be extended further, or be made more intimate. To have gone a step beyond, would have been to consolidate the *States*, and not the Union;—and thereby to have destroyed the latter.

It involved another change, growing out of the division of the powers of government, between the United States and the separate States;—requiring that those delegated to the former should be carefully enumerated and specified, in order to prevent collision between them and the powers reserved to the several States respectively. There was no necessity for such great caution under the confederacy, as its Congress could exercise little power, except through the States, and with their co-operation. Hence the care, circumspection and precision, with which the grants of powers are made in the one, and the comparatively loose, general, and more indefinite manner in which they are made in the other.

It involved another, intimately connected with the preceding, and of great importance. It entirely changed the relation which the separate governments of the States sustained to the body, which represented them in their confederated character, under the confederacy; for this was essentially different from that which they now sustain to the government of the United States, their present representative. The governments of the States

sustained, to the former, the relation of superior to subordinate—of the creator to the creature; while they now sustain, to the latter, the relation of equals and co-ordinates. Both governments,—that of the United States and those of the separate States, derive their powers from the same source, and were ordained and established by the same authority;—the only difference being, that in ordaining and establishing the one, the people of the several States acted with concert or mutual understanding;—while, in ordaining and establishing the others, the people of each State acted separately, and without concert or mutual understanding;—as has been fully explained. Deriving their respective powers, then, from the same source, and being ordained and established by the same authority,—the two governments, State and Federal, must, of necessity, be equal in their respective spheres; and both being ordained and established by the people of the States, respectively,—each for itself, and by its own separate authority,—the constitution and government of the United States must, of necessity, be the constitution and government of each;—as much so as its own separate and individual constitution and government; and, therefore, they must stand, in each State, in the relation of co-ordinate constitutions and governments. It is on this ground only, that the former is the constitution and government of all the States:—not because it is the constitution and government of the whole, considered in the aggregate as constituting one nation, but because it is the constitution and government of each respective-

ly: for to suppose that they are the constitution and government of *each*, because of the *whole*, would be to assume, what is not true, that they were ordained and established by the American people in the aggregate, as forming one nation. This would be to reduce the several States to subordinate and local divisions; and to convert their separate constitutions and governments into mere charters and subordinate corporations: when, in truth and fact, they are equals and co-ordinates.

It, finally, involved a great change in the manner of carrying into execution the delegated powers. As a government, it was necessary to clothe it with the attribute of deciding, in the first instance, on the extent of its powers,—and of acting on individuals, directly, in carrying them into execution; instead of appealing to the agency of the governments of the States,—as was the case with the Congress of the confederacy.

Such are the essential distinctions between a federal government and a confederacy;—and such, in part, the important changes necessarily involved, in substituting a government, in the place of the Congress of the confederacy.

It now remains to be shown, that the government is a republic;—a republic,—or, (if the expression be preferred,) a constitutional democracy, in contradistinction to an absolute democracy.

It is not an uncommon impression, that the government of the United States is a government based simply on population; that numbers are its only element, and a numerical majority its only control-

ling power. In brief, that it is an absolute democracy. No opinion can be more erroneous. So far from being true, it is, in all the aspects in which it can be regarded, pre-eminently a government of the concurrent majority; with an organization, more complex and refined, indeed, but far better calculated to express the sense of the whole, (in the only mode by which this can be fully and truly done,—to wit, by ascertaining the sense of all its parts,) than any government ever formed, ancient or modern. Instead of population, mere numbers, being the sole element, the numerical majority is, strictly speaking, excluded, even as one of its elements; as I shall proceed to establish, by an appeal to figures; beginning with the formation of the constitution, regarded as the fundamental law which ordained and established the government; and closing with the organization of the government itself, regarded as the agent or trustee to carry its powers into effect.

I shall pass by the Annapolis convention, on whose application, the convention which framed the constitution, was called; because it was a partial and informal meeting of delegates from a few States; and commence with the Congress of the confederation, by whom it was authoritatively called. That Congress derived its authority from the articles of confederation; and these, from the unanimous agreement of all the States;—and not from the numerical majority, either of the several States, or of their population. It voted, as has been stated, by delegations; each counting one. A majority of each delegation, with a few important exceptions,

decided the vote of its respective State. Each State, without regard to population, had thus an equal vote. The confederacy consisted of thirteen States; and, of course, it was in the power of any seven of the smallest, as well as the largest, to defeat the call of the convention; and, by consequence, the formation of the constitution.

By the first census, taken in 1790—three years after the call—the population of the United States amounted to 3,394,563, estimated in federal numbers. Assuming this to have been the whole amount of its population at the time of the call, (which can cause no material error,) the population of the seven smallest States was 959,801; or less than one third of the whole: so that, less than one third of the population could have defeated the call of the convention.

The convention voted, in like manner, by States; and it required the votes of a majority of the delegations present, to adopt the measure. There were twelve States represented,—Rhode Island being absent;—so that the votes of seven delegations were required; and, of course, less than one third of the population of the whole, could have defeated the formation of the constitution.

The plan, when adopted by the convention, had again to be submitted to Congress,—and to receive its sanction, before it could be submitted to the several States for their approval,—a necessary preliminary to its final reference to the conventions of the people of the several States for their ratification. It had thus, of course, to pass again the ordeal of Con-

gress; when the delegations of seven of the smallest States, representing less than one third of the population, could again have defeated, by refusing to submit it for their consideration. And, stronger still;—when submitted, it required, by an express provision, the concurrence of nine of the thirteen, to establish it, between the States ratifying it; which put it in the power of any four States, the smallest as well as the largest, to reject it. The four smallest, to wit: Delaware, Rhode Island, Georgia, and New Hampshire, contained, by the census of 1790, a federal population of only 336,948—but a little more than one eleventh of the whole: but, as inconsiderable as was their population, they could have defeated it, by preventing its ratification. It thus appears, that the numerical majority of the population, had no agency whatever in the process of forming and adopting the constitution; and that neither this, nor a majority of the States, constituted an element in its ratification and adoption.

In the provision for its amendment, it prescribes, as has been stated, two modes:—one, by two thirds of both houses of Congress; and the other, by a convention of delegates from the States, called by Congress, on the application of two thirds of their respective legislatures. But, in neither case can the proposed amendment become a part of the constitution, unless ratified by the legislatures of three fourths of the States, or by conventions of the people of three fourths,—as Congress may prescribe; so that, in the one, it requires the consent of two thirds of the States to propose amendments,—and,

in both cases, of three fourths to adopt and ratify them, before they can become a part of the constitution. As there are, at present, thirty States in the Union, it will take twenty to propose, and, of course, would require but eleven to defeat, a proposition to amend the constitution; or, nineteen votes in the Senate,—if it should originate in Congress,—and the votes of eleven legislatures, if it should be to call a convention. By the census of 1840, the federal population of all the States,—including the three, which were then territories, but which have since become States,—was 16,077,604. To this add Texas, since admitted, say 110,000;—making the aggregate, 16,187,604. Of this amount, the eleven smallest States (Vermont being the largest of the number) contained a federal population of but 1,638,521: and yet they can prevent the other nineteen States, with a federal population of 14,549,082, from even proposing amendments to the constitution: while the twenty smallest, (of which Maine is the largest,) with a federal population of 3,526,-811, can compel Congress to call a convention to propose amendments, against the united votes of the other ten, with a federal population of 12,660,793. Thus, while less than one eighth of the population, may, in the one case, prevent the adoption of a proposition to amend the constitution,—less than one fourth can, in the other, adopt it.

But, striking as are these results, the process, when examined with reference to the ratification of proposals to amend, will present others still more so. Here the consent of three fourths of the States

is required; which, with the present number, would make the concurrence of twenty-three States necessary to give effect to the act of ratification; and, of course, puts it in the power of any eight States to defeat a proposal to amend. The federal population of the eight smallest is but 776,969; and yet, small as this is, they can prevent amendments, against the united votes of the other twenty-two, with a federal population of 15,410,635; or nearly twenty times their number. But while so small a portion of the entire population can prevent an amendment, twenty-three of the smallest States,—with a federal population of only 7,254,400,—can amend the constitution, against the united votes of the other seven, with a federal population of 8,933,204. So that a numerical minority of the population can amend the constitution, against a decided numerical majority; when, at the same time, one nineteenth of the population can prevent the other eighteen nineteenths from amending it. And more than this: any one State,—Delaware, for instance, with a federal population of only 77,043,—can prevent the other twenty-nine States, with a federal population of 16,110,561, from so amending the constitution as to deprive the States of an equality of representation in the Senate. To complete the picture:—Sixteen of the smallest States,—that is, a majority of them, with a population of only 3,411,672,—a little more than one fifth of the whole,—can, in effect, destroy the government and dissolve the Union, by simply declining to appoint Senators; against the united voice of the other fourteen States, with a population of

12,775,932;—being but little less than four fifths of the whole.

These results, resting on calculations, which exclude doubt, incontestably prove,—not only that the authority which formed, ratified, and even amended the constitution, regulates entirely the numerical majority, as one of its elements,—but furnish additional and conclusive proof, if additional were needed, that ours is a federal government;—a government made by the several States; and that States, and not individuals, are its constituents. The States, throughout, in forming, ratifying and amending the constitution, act as equals, without reference to population.

Regarding the Government, apart from the Constitution, and simply as the trustee or agent to carry its powers into execution, the case is somewhat different. It is composed of two elements: One, the States, regarded in their corporate character,—and the other, their representative population,—estimated in, what is called, "federal numbers;"—which is ascertained, "by adding to the whole number of free persons, including those bound to service for a term of years,—and excluding Indians not taxed,—three fifths of all others."* These elements, in different proportions, enter into, and constitute all the departments of the government; as will be made apparent by a brief sketch of its organization.

The government is divided into three separate

* 1st Art. 2d Sec. of Con.

departments, the legislative, the executive, and the judicial. The legislative consists of two bodies,—the Senate, and the House of Representatives. The two are called the Congress of the United States: and all the legislative powers delegated to the government, are vested in it. The Senate is composed of two members from each State, elected by the legislature thereof, for the term of six years; and the whole number is divided into three classes; of which one goes out at the expiration of every two years. It is the representative of the States, in their corporate character. The members vote *per capita*, and a majority decides all questions of a legislative character. It has equal power with the House, on all such questions,—except that it cannot originate "bills for raising revenue." In addition to its legislative powers, it participates in the powers of the other two departments. Its advice and consent are necessary to make treaties and appointments; and it constitutes the high tribunal, before which impeachments are tried. In advising and consenting to treaties, and in trials of impeachments, two thirds are necessary to decide. In case the electoral college fails to choose a Vice-President, the power devolves on the Senate to make the selection from the two candidates having the highest number of votes. In selecting, the members vote by States, and a majority of the States decide. In such cases, two thirds of the whole number of Senators are necessary to form a quorum.

The House of Representatives is composed of members elected by the people of the several

States, for the term of two years. The right of voting for them, in each State, is confined to those who are qualified to vote for the members of the most numerous branch of its own legislature. The number of members is fixed by law, under each census,—which is taken every ten years. They are apportioned among the several States, according to their population, estimated in federal numbers; but each State is entitled to have one. The House, in addition to its legislative powers, has the sole power of impeachment; as well as of choosing the President (in case of a failure to elect by the electoral college) from the three candidates, having the greatest number of votes. The members, in such case, vote by States;—the vote of each delegation, if not equally divided, counts one, and a majority decides. In all other cases they vote *per capita*, and the majority decides; except only on a proposition to amend the constitution.

The executive powers are vested in the President of United States. He and the Vice-President, are chosen for the term of four years, by electors, appointed in such manner as the several States may direct. Each State is entitled to a number, equal to the whole number of its Senators and Representatives for the time. The electors vote *per capita*, in their respective States, on the same day throughout the Union; and a majority of the votes of all the electors is requisite to a choice. In case of a failure to elect, either in reference to the President or Vice-President, the House or the Senate, as the case may be, make the choice, in the manner before

stated. If the House fail to choose before the fourth day of March next ensuing,—or in case of the removal from office, death, resignation, or inability of the President,—the Vice-President acts as President. In addition to the ordinary executive powers, the President has the authority to make treaties and appointments, by, and with the advice and consent of the Senate; and to approve or disapprove all bills before they become laws; as well as all orders, resolutions or votes, to which the concurrence of both houses of Congress is necessary,—except on questions of adjournment,—before they can take effect. In case of his disapproval, the votes of two thirds of both houses are necessary to pass them. He is allowed ten days (Sundays not counted) to approve or disapprove; and if he fail to act within that period, the bill, order, resolution or vote, (as the case may be,) becomes as valid, to all intents and purposes, as if he had signed it; unless Congress, by its adjournment, prevent its return.

The judicial power is vested in one Supreme Court, and such inferior courts, as Congress may establish. The Judges of both are appointed by the President in the manner above stated; and hold their office during good behavior.

The President, Vice-President, Judges, and all the civil officers, are liable to be impeached for treason, bribery, and other high crimes and misdemeanors.

From this brief sketch, it is apparent that the States, regarded in their corporate character, and

the population of the States, estimated in federal numbers, are the two elements, of which the government is exclusively composed; and that they enter, in different proportions, into the formation of all its departments. In the legislative they enter in equal proportions, and in their most distinct and simple form. Each, in that department, has its appropriate organ; and each acts by its respective majorities,—as far as legislation is concerned. No bill, resolution, order, or vote, partaking of the nature of a law, can be adopted without their concurring assent: so that each house has a veto on the other, in all matters of legislation. In the executive they are differently blended. The powers of this department are vested in a single functionary; which made it impossible to give to them separate organs, and concurrent action. In lieu of this, the two elements are blended in the constitution of the college of electors, which chooses the President: but as this gave a decided preponderance to the element of population,—because of the greater number of which it was composed,—in order to combat and to compensate this advantage,—and to preserve, as far as possible, the equipoise between the two, the power was vested in the House, voting by States, to choose him from the three candidates, having the largest number of votes, in case of a failure of choice by the college; and in case of a failure to select by the House, or of removal, death, resignation, or inability, the Vice-President was authorized to act as President. These provisions gave a preponderance, even more decided, to the other

element, in the eventual choice. This was still more striking as the constitution stood at its adoption. It originally provided that each elector should vote for two candidates, without designating which should be the President, or which the Vice-President; the person having the highest number of votes to be the President, if it should be a majority of the whole number given. If there should be more than one having such majority,—and an equal number of votes,—the House, voting by States, should choose between them, which should be President:—but if none should have a majority, the House, voting in the same way, should choose the President from the five having the greatest number of votes; the person having the greatest number of votes, after the choice of the President, to be the Vice-President. But in case of two or more having an equal number, the Senate should elect from among them the Vice-President.

Had these provisions been left unaltered, and not superseded, in practice, by caucuses and party conventions, their effect would have been to give to the majority of the people of the several States, the right of nominating five candidates; and to the majority of the States, acting in their corporate character, the right of choosing from them, which should be President, and which Vice-President. The President and Vice-President would, virtually, have been elected by the concurrent majority of the several States, and of their population, estimated in federal numbers; and, in this important respect, the executive would have been assimilated to the legis-

lative department. But the Senate, in addition to its legislative, is vested also with supervisory powers in respect to treaties and appointments, which give it a participation in executive powers, to that extent; and a corresponding weight in the exercise of two of its most important functions. The treaty-making power is, in reality, a branch of the law-making power; and we accordingly find that treaties as well as the constitution itself, and the acts of Congress, are declared to be the supreme law of the land. This important branch of the law-making power includes all questions between the United States and foreign nations, which may become the subjects of negotiation and treaty; while the appointing power is intimately connected with the performance of all its functions.

In the Judiciary the two elements are blended, in proportions different from either of the others. The President, in the election of whom they are both united, nominates the judges; and the Senate, which consists exclusively of one of the elements, confirms or rejects: so that they are, to a certain extent, concurrent in this department; though the States, considered in their corporate capacity, may be said to be its predominant element.

In the impeaching power, by which it was intended to make the executive and judiciary responsible, the two elements exist and act separately, as in the legislative department:—the one, constituting the impeaching power, resides in the House of Representatives; and the other, the power that tries and pronounces judgment, in the Senate: and thus,

although existing separately in their respective bodies, their joint and concurrent action is necessary to give effect to the power.

It thus appears, on a view of the whole, that it was the object of the framers of the constitution, in organizing the government, to give to the two elements, of which it is composed, separate, but concurrent action; and, consequently, a veto on each other, whenever the organization of the department, or the nature of the power would admit: and when this could not be done, so to blend the two, as to make as near an approach to it, in effect, as possible. It is, also, apparent, that the government, regarded apart from the constitution, is the government of the concurrent, and not of the numerical majority. But to have an accurate conception how it is calculated to act in practice; and to establish, beyond doubt, that it was neither intended to be, nor is, in fact, the government of the numerical majority, it will be necessary again to appeal to figures.

That, in organizing a government with different departments, in each of which the States are represented in a twofold aspect, in the manner stated, it was the object of the framers of the constitution, to make it more, instead of less popular than it would have been as a government of the mere numerical majority—that is, as requiring a more numerous, instead of a less numerous constituency to carry its powers into execution,—may be inferred from the fact, that such actually is the effect. Indeed, the necessary effect of the concurrent majority is, to make the government more popular;—that is, to require more

wills to put it in action, than if any one of the majorities, of which it is composed, were its sole element;—as will be apparent by reference to figures.

If the House, which represents population, estimated in federal numbers, had been invested with the sole power of legislation, then six of the larger States, to wit, New-York, Pennsylvania, Virginia, Ohio, Massachusetts and Tennessee, with a federal population of 8,216,279, would have had the power of making laws for the other twenty-four, with a federal population of 7,971,325. On the other hand, if the Senate had been invested with the sole power, sixteen of the smallest States,—embracing Maryland as the largest,—with a federal population of 3,411,672, would have had the power of legislating for the other fourteen, with a population of 12,775,-932. But the constitution, in giving each body a negative on the other, in all matters of legislation, makes it necessary that a majority of each should concur to pass a bill, before it becomes an act; and the smallest number of States and population, by which this can be effected, is six of the larger voting for it in the House of Representatives,—and ten of the smaller, uniting with them in their vote, in the Senate. The ten smaller, including New-Hampshire as the largest, have a federal population of 1,346,-575; which, added to that of the six larger, would make 9,572,852. So that no bill can become a law, with less than the united vote of sixteen States, representing a constituency containing a federal population of 9,572,852, against fourteen States, representing a like population of 6,614,752.

But, when passed, the bill is subject to the President's approval or disapproval. If he disapprove, or, as it is usually termed, vetoes it, it cannot become a law unless passed by two thirds of the members of both bodies. The House of Representatives consists of 228,—two thirds of which is 152; —which, therefore, is the smallest number that can overcome his veto. It would take ten of the larger States, of which Georgia is the smallest, to make up that number;—the federal population of which is 10,853,175: and, in the Senate, it would require the votes of twenty States to overrule it;—and, of course, ten of the larger united with ten of the smaller. But the ten smaller States have a federal population of only 1,346,575,—as has been stated,— which added to that of the ten larger, would give 12,199,748, as the smallest population by which his veto can be overruled, and the act become a law. Even then, it is liable to be pronounced unconstitutional by the judges, should it, in any case before them, come in conflict with their views of the constitution;—a decision which, in respect to individuals, operates as an absolute veto, which can only be overruled by an amendment of the constitution. In all these calculations, I assume a full House, and full votes;—and that members vote according to the will of their constituents.

If the election of the President, by the electoral college, be compared with the passage of a bill by Congress, it will be found that it requires a smaller federal number to elect, than to pass a bill;—resulting from the fact that the two majorities, in the one

case, are united and blended together, instead of acting concurrently, as in the other. There are, at present, 288 members of Congress, of which 60 are Senators, and the others, members of the House of Representatives; and, as each State is entitled to appoint as many electors as it has members of Congress, there is, of course, the same number of electors. One hundred and forty-five constitute a majority of the whole; and, of course, are necessary to a choice. Seven of the States of the largest class, say, New-York, Pennsylvania, Virginia, Ohio, Tennessee, Kentucky and Indiana, combined with one of a medium size, say, New Hampshire, are entitled to that number;—and, with a federal population of 9,125,936, may overrule the vote of the other twenty-two, with a population of 7,061,668: so that a small minority of States, with not a large majority of population, can elect a President by the electoral college,—against a very large majority of the States, with a population not greatly under a majority. It follows, therefore, that the choice of a President, when made by the electoral college, may be less popular in its character than when made by Congress,—which cannot elect without a concurrence of a federal population of upwards of nine and a half millions. But to compensate this great preponderance of the majority based on population, over that based on the States, regarded in their corporate character, in an election by the college of electors, the provision giving to the House of Representatives, voting by States, the eventual choice, in case the college fail to elect, was adopted. Under its

operation, sixteen of the smallest States, with a federal population of 3,411,672, may elect the President, against the remaining fourteen, with a federal population of 12,775,932:—which gives a preponderance equally great to the States, without reference to population, in the contingency mentioned.

From what has been stated, the conclusion follows, irresistibly, that the constitution and the government, regarding the latter apart from the former, rest, throughout, on the principle of the concurrent majority; and that it is, of course, a Republic;—a constitutional democracy, in contradistinction to an absolute democracy; and that, the theory which regards it as a government of the mere numerical majority, rests on a gross and groundless misconception. So far is this from being the case, the numerical majority was entirely excluded as an element, throughout the whole process of forming and ratifying the constitution: and, although admitted as one of the two elements, in the organization of the government, it was with the important qualification, that it should be the numerical majority of the population of the *several States*, regarded in their corporate character, and not of the whole Union, regarded as one community. And further than this;—it was to be the numerical majority, not of their entire population, but of their federal population; which, as has been shown, is estimated artificially,—by excluding two fifths of a large portion of the population of many of the States of the Union. Even with these important qualifications, it was admitted as the less prominent of the two.

With the exception of the impeaching power, it has no direct participation in the functions of any department of the government, except the legislative; while the other element participates in some of the most important functions of the executive; and, in the constitution of the Senate, as a court to try impeachments, in the highest of the judicial functions. It was, in fact, admitted, not because it was the numerical majority, nor on the ground, that, as such, it ought, of right, to constitute one of its elements,—much less the only one;—but for a very different reason. In the federal constitution, the equality of the States, without regard to population, size, wealth, institutions, or any other consideration, is a fundamental principle; as much so as is the equality of their citizens, in the governments of the several States, without regard to property, influence, or superiority of any description. As, in the one, the citizens form the constituent body;—so, in the other, the States. But the latter, in forming a government for their mutual protection and welfare, deemed it proper, as a matter of fairness and sound policy, and not of right, to assign to it an increased weight, bearing some reasonable proportion to the different amount of means which the several States might, respectively, contribute to the accomplishment of the ends, for which they were about to enter into a federal union. For this purpose they admitted, what is called federal numbers, as one of the elements of the government about to be established; while they were, at the same time, so jealous of the effects of admitting it, with all its

restrictions,—that, in order to guard effectually the other element, they provided that no State, without its consent, should be deprived of its equal suffrage in the Senate; so as to place their equality, in that important body, beyond the reach even of the amending power.

I have now established, as proposed at the outset, that the government of the United States is a democratic federal Republic;—democratic in contradistinction to aristocratic, and monarchical;—federal, in contradistinction to national, on the one hand,—and to a confederacy, on the other; and a Republic—a government of the concurrent majority, in contradistinction to an absolute democracy—or a government of the numerical majority.

But the government of the United States, with all its complication and refinement of organization, is but a part of a system of governments. It is the representative and organ of the States, only to the extent of the powers delegated to it. Beyond this, each State has its own separate government, which is its exclusive representative and organ, as to all the other powers of government;—or, as they are usually called, the reserved powers. However correct, then, our conception of the character of the government of the United States viewed by itself, may be, it must be very imperfect, unless viewed at the same time, in connection with the complicated system, of which it forms but a part. In order to present this more perfect view, it will be essential, first, to present the outlines of the entire system, so far as it may be necessary to show the nature and

character of the relation between the two—the government of the United States and the separate State governments. For this purpose, it will be expedient to trace, historically, the origin and formation of the system itself, of which they constitute the parts.

I have already shown, that the present government of the United States was reared on the foundation of the articles of confederation and perpetual union; that these last did but little more than define the powers and the extent of the government and the union, which had grown out of the exigencies of the revolution; and that these, again, had but enlarged and strengthened the powers and the union which the exigencies of a common defence against the aggression of the parent country, had forced the colonies to assume and form. What I now propose is, to trace briefly downwards, from the beginning, the causes and circumstances which led to the formation, in all its parts, of our present peculiar, complicated, and remarkable system of governments. This may be readily done,—for we have the advantage, (possessed by few people, who, in past times, have formed and flourished under remarkable political institutions,) of historical accounts, so full and accurate, of the origin, rise, and formation of our institutions, throughout all their stages,—as to leave nothing relating to either, to vague and uncertain conjecture.

It is known to all, in any degree familiar with our history, that the region embraced by the original States of the Union appertained to the crown

of Great Britain, at the time of its colonization; and that different portions of it were granted to certain companies or individuals, for the purpose of settlement and colonization. It is also known, that the thirteen colonies, which afterwards declared their independence, were established under charters which, while they left the sovereignty in the crown, and reserved the general power of supervision to the parent country, secured to the several colonies popular representation in their respective governments, or in one branch, at least, of their legislatures, —with the general rights of British subjects. Although the colonies had no political connection with each other, except as dependent provinces of the same crown—they were closely bound together by the ties of a common origin, identity of language, similarity of religion, laws, customs, manners, commercial and social intercourse,—and by a sense of common danger;—exposed, as they were, to the incursions of a savage foe, acting under the influence of a powerful and hostile nation.

In this embryo state of our political existence, are to be found all the elements which subsequently led to the formation of our peculiar system of governments. The revolution, as it is called, produced no other changes than those which were necessarily caused by the declaration of independence. These were, indeed, very important. Its first and necessary effect was, to cut the cord which had bound the colonies to the parent country,—to extinguish all the authority of the latter,—and, by consequence, to convert them into thirteen independent and sovereign States.

I say, "independent and sovereign," because, as the colonies were, politically and in respect to each other, wholly independent,—the sovereignty of each, regarded as distinct and separate communities, being vested in the British crown,—the necessary effect of severing the tie which bound them to it was, to devolve the sovereignty on each respectively, and, thereby, to convert them from dependent colonies, into independent and sovereign States. Thus, the region occupied by them, came to be divided into as many States as there were colonies, each independent of the others,—as they were expressly declared to be; and only united to the extent necessary to defend their independence, and meet the exigencies of the occasion:—and hence that great and, I might say, providential territorial division of the country, into independent and sovereign States, on which our entire system of government rests.

Its next effect was, to transfer the sovereignty which had, heretofore, resided in the British crown, not to the *governments* of, but to the *people* composing the *several* States. It could only devolve on them. The declaration of independence, by extinguishing the British authority in the several colonies, necessarily destroyed every department of their governments, except such as derived their authority from, and represented their respective people. Nothing, then, remained of their several governments, but the popular and representative branches of them. But a representative government, even when entire, cannot possibly be the seat of sovereignty,—the supreme and ultimate

power of a State. The very term, "*representative*," implies a superior in the individual or body represented. Fortunately for us, the people of the several colonies constituted, not a mere mass of individuals, without any organic arrangements to express their sovereign will, or carry it into effect. On the contrary, they constituted organized communities,—in the full possession and constant exercise of the right of suffrage, under their colonial governments. Had they constituted a mere mass of individuals,—without organization, and unaccustomed to the exercise of the right of suffrage, it would have been impossible to have prevented those internal convulsions, which almost ever attend the change of the seat of sovereignty;—and which so frequently render the change rather a curse than a blessing. But in their situation, and under its circumstances, the change was made without the least convulsion, or the slightest disturbance. The mere will of the sovereign communities, aided by the remaining fragments,—the popular branches of their several colonial governments, speedily ordained and established governments, each for itself; and thus passed, without anarchy,—without a shock, from their dependent condition under the colonial governments, to that of independence under those established by their own authority.

Thus commenced the division between the constitution-making and the law-making powers;—between the power which ordains and establishes the fundamental laws;—which creates, organizes and invests government with its authority, and subjects it

to restrictions;—and the power that passes acts to carry into execution, the powers thus delegated to government. The one, emanating from the people, as forming a *sovereign community*,—creates the government;—the other, as a representative appointed to execute its powers, enacts laws to regulate and control the conduct of the people, regarded as *individuals*. This division between the two powers,—thus necessarily incident to the separation from the parent country,—constitutes an element in our political system as essential to its formation, as the great and primary territorial division of independent and sovereign States. Between them, it was our good fortune never to have been left, for a moment, in doubt, as to where the sovereign authority was to be found; or how, and by whom it should be exercised: and, hence, the facility, the promptitude and safety, with which we passed from one state to the other, as far as internal causes were concerned. Our only difficulty and danger lay in the effort to resist the immense power of the parent country.

The governments of the several States were thus rightfully and regularly constituted. They, in the course of a few years, by entering into articles of confederation and perpetual union, established and made more perfect the union which had been informally constituted, in consequence of the exigencies growing out of the contest with a powerful enemy. But experience soon proved that the confederacy was wholly inadequate to effect the objects for which it was formed. It was then, and not until then, that the causes which had their origin in our

embryo state, and which had, thus far, led to such happy results, fully developed themselves. The failure of the confederacy was so glaring, as to make it appear to all, that something must be done to meet the exigencies of the occasion :—and the great question which presented itself to all was;—what should, or could be done?

To dissolve the Union was too abhorrent to be named. In addition to the causes which had connected them by such strong cords of affection while colonies, there were superadded others, still more powerful,—resulting from the common dangers to which they had been exposed, and the common glory they had acquired, in passing successfully through the war of the revolution. Besides, all saw that the hope of reaping the rich rewards of their successful resistance to the encroachment of the parent country, depended on preserving the Union.

But, if disunion was out of the question, consolidation was not less repugnant to their feelings and opinions. The attachments of all to their respective States and institutions, were strong, and of long standing,—since they were identified with their respective colonies; and, for the most part, had survived the separation from the parent country. Nor were they unaware of the danger to their liberty and property, to be apprehended from a surrender of their sovereignty and existence, as separate and independent States, and a consolidation of the whole into one nation. They regarded disunion and consolidation as equally dangerous; and were, therefore, equally opposed to both.

To change the form of government to an aristocracy or monarchy, was not to be thought of. The deepest feelings of the common heart were in opposition to them, and in favor of popular government.

These changes or alterations being out of the question, what other remained to be considered? Men of the greatest talents and experience were at a loss for an answer. To meet the exigencies of the occasion, a convention of the States was called. When it met, the only alternative, in the opinion of the larger portion of its most distinguished members, was, the establishment of a *national* government; which was but another name, in reality, for *consolidation*. But where wisdom and experience proved incompetent to provide a remedy, the necessity of doing something, combined with the force of those causes, which had thus far shaped our destiny, carried us successfully through the perilous juncture. In the hour of trial, we realized the precious advantages we possessed in the two great and prime elements that distinguish our system of governments,—the division of the country, territorially, into independent and sovereign States,—and the division of the powers of government into *constitution* and *law*-making powers. Of the materials which they jointly furnished, the convention was enabled to construct the present system,—the only alternative left, by which we could escape the dire consequences attendant on the others; and which has so long preserved peace among ourselves, and protected us against danger from abroad. Each

contributed essential aid towards the accomplishment of this great work.

To the former, we owe the mode of constituting the convention;—as well as that of voting, in the formation and adoption of the constitution,—and, finally, in the ratification of it by the States: and to them, jointly, are we exclusively indebted for that peculiar form which the constitution and government finally assumed. It is impossible to read the proceedings of the convention, without perceiving that, if the delegates had been appointed by the people at large, and in proportion to population, nothing like the present constitution could have been adopted. It would have assumed the form best suited to the views and interests of the more populous and wealthy portions; and, for that purpose, been made paramount to the existing State governments: in brief, a consolidated, *national* government would have been formed. But as the convention was composed of delegates from separate independent and sovereign States, it involved the necessity of voting by States, in framing and adopting the constitution; and,—what is of far more importance,—the necessity of submitting it to the States for their respective ratifications; so that each should be bound by its own act, and not by that of a majority of the States, nor of their united population. It was this necessity of obtaining the consent of a majority of the States in convention, as, also, in the intermediate process,—and, finally, the unanimous approval of all, in order to make it obligatory on all, which rendered it indispensable for the conven-

tion to consult the feelings and interests of all. This, united with the absolute necessity of doing something, in order to avert impending calamities of the most fearful character, impressed all with feelings of moderation, forbearance, mutual respect, concession, and compromise, as indispensable to secure the adoption of some measure of security. It was the prevalence of these impressions, that stamped their work with so much fairness, equity, and justice,—as to receive, finally, the unanimous ratification of the States; and which has caused it to continue ever since, the object of the admiration and attachment of the reflecting and patriotic.

But the moderation, forbearance, mutual respect, concession, and compromise, superinduced by the causes referred to, could, of themselves, have effected nothing, without the aid of the division between the constitution and the law-making powers. Feebleness and a tendency to disorder are inherent in confederacies; and cannot be remedied, simply by the employment or modification of their powers. But as governments, according to our conceptions, cannot ordain and establish constitutions;—and as those of the States had already gone as far as they rightfully could, in framing and adopting the articles of confederation and perpetual union, it would have been impossible to have called the present constitution and government into being, without invoking the high creating power, which ordained and established those of the several States. There was none other competent to the task. It was, therefore, invoked; and formed a constitution and

government for the United States, as it had formed and modelled those of the several States. The first step was,—the division of the powers of government; —which was effected, by leaving subject to the exclusive control of the several States in their separate and individual character, all powers which, it was believed, they could advantageously exercise for themselves respectively,—without incurring the hazard of bringing them in conflict with each other; —and by delegating, specifically, others to the United States, in the manner explained. It is this division of the powers of the government into such as are delegated, specifically, to the common and joint government of all the States,—to be exercised for the benefit and safety of each and all;—and the reservation of all others to the States respectively, —to be exercised through the separate government of each, which makes ours, *a system of governments*, as has been stated.

It is obvious, from this sketch, brief as it is,—taken in connection with what has been previously established,—that the two governments, General and State, stand to each other, in the first place, in the relation of parts to the whole; not, indeed, in reference to their organization or functions,—for in this respect both are perfect,—but in reference to their *powers*. As they divide between them the delegated powers appertaining to government,—and as, of course, each is divested of what the other possesses, —it necessarily requires the two united to constitute one entire government. That they are both paramount and supreme within the sphere of their

respective powers;—that they stand, within these limits, as equals,—and sustain the relation of co-ordinate governments, has already been fully established. As co-ordinates, they sustain to each other the same relation which subsists between the different departments of the government—the executive, the legislative, and the judicial,—and for the same reason. These are co-ordinates; because each, in the sphere of its powers, is equal to, and independent of the others; and because the three united make the government. The only difference is that, in the illustration, each department, by itself, is not a government,—since it takes the whole in connection to form one; while the governments of the several States respectively, and that of the United States, although perfect governments in themselves, and in their respective spheres, require to be united in order to constitute one entire government. They, in this respect, stand as principal and supplemental;—while the co-departments of each stand in the relation of parts to the whole. The opposite theory, which would make the constitution and government of the United States the government of the whole,—and the government of each, *because* the government of the whole,—and not that of *all*, because of *each*,—besides the objection already stated, would involve the absurdity of each State having only half a constitution, and half a government; and this, too, while possessed of the supreme sovereign power. Taking all the parts together, the people of thirty independent and sovereign States, confederated by a solemn constitutional com-

pact into one great federal community, with a system of government, in all of which, powers are separated into the great primary divisions of the *constitution*-making and the *law*-making powers; those of the latter class being divided between the common and joint government of all the States, and the separate and local governments of each State respectively;—and, finally, the powers of both distributed among three separate and independent departments, legislative, executive, and judicial;—presents, in the whole, a political system as remarkable for its grandeur as it is for its novelty and refinement of organization.—For the structure of such a system—so wise, just, and beneficent,—we are far more indebted to a superintending Providence, that so disposed events as to lead, as if by an invisible hand, to its formation, than to those who erected it. Intelligent, experienced, and patriotic as they were, they were but builders under its superintending direction.

Having shown in what relation the government of the United States and those of the separate States stand to each other, I shall next proceed to trace the line which divides their respective powers; or, to express it in constitutional language,—which distinguishes between the powers delegated to the United States, and those reserved to the States respectively,—with the restrictions imposed on each. In doing this, I propose to group the former under general heads, accompanied by such remarks as may be deemed necessary, in reference to the object in view.

In deciding what powers ought, and what ought not to be granted, the leading principle undoubtedly was, to delegate those only which could be more safely, or effectually, or beneficially exercised for the common good of all the States, by the joint or general government of all, than by the separate government of each State; leaving all others to the several States respectively. The object was, not to supersede the separate governments of the States,—but to establish a joint supplemental government; in order to do that, which either could not be done at all, or as safely and well done by them, as by a joint government of all. This leading principle embraced two great divisions of power, which may be said to comprehend all, or nearly all the delegated powers; either directly, or as a means to carry them into execution. One of them embraces all the powers appertaining to the relations of the States with the rest of the world, called their foreign relations; and the other, of an internal character, embraces such as appertain to the exterior relations of the States with each other. It is clear that both come within the leading principle; as each is of a description which the States, in their separate character, are either incompetent to exercise at all, or if competent, to exercise consistently with their mutual peace, safety, and prosperity. Indeed, so strong and universal has this opinion been, in reference to the powers appertaining to their foreign relations, that, from the Declaration of Independence to the present time, in all the changes through which they have passed, the Union

has had exclusive charge of this great division of powers. To the rest of the world, the States composing this Union are now, and ever have been known in no other than their united, confederated character. Abroad,—to the rest of the world,—they are but *one*. It is only at home, in their interior relations, that they are *many;* and it is to this twofold aspect that their motto, "*E pluribus unum*," appropriately and emphatically applies. So imperious was the necessity of union, and a common government to take charge of their foreign relations, that it may be safely affirmed, not only that it led to their formation, but that, without it, the States never would have been united. The same necessity still continues to be one of the strongest bonds of their union. But, strong as was, and still is, the inducement to union, in order to preserve their mutual peace and safety *within*, it was not, of itself, sufficiently strong to unite the parts composing this vast federal fabric; nor, probably, is it, of itself, sufficiently strong to hold them together.

This great division of authority appertains to the treaty-making power; and is vested in the President and Senate. The power of negotiating treaties belongs exclusively to the former; but he cannot make them without the advice and consent of the latter. When made, they are declared to be the supreme law of the land. The reason for vesting this branch of the law-making power exclusively in the President and Senate, to the exclusion of the House of Representatives, is to be traced to the necessity of secrecy in conducting negotiations and

making treaties;—as they often involve considerations calculated to have great weight,—but which cannot be disclosed without hazarding their success. Hence the objection to so numerous a body as the House of Representatives participating in the exercise of the power. But to guard against the dangers which might result from confiding the power to so small a body, the advice and consent of *two thirds* of the Senators present was required.

There is a very striking difference between the manner in which the treaty-making and the law-making power, in its strict sense, are delegated, which deserves notice. The former is vested in the President and Senate by a few general words, without enumerating or specifying, particularly, the power delegated. The constitution simply provides that, "he shall have power, by and with the advice and consent of the Senate, to make treaties; provided two thirds of the Senators present concur;"—while the legislative powers vested in Congress, are, one by one, carefully enumerated and specified. The reason is to be found in the fact, that the treaty-making power is vested, *exclusively*, in the government of the United States; and, therefore, nothing more was necessary in delegating it, than to specify, as is done, the portion or department of the government in which it is vested. It was, then, not only unnecessary, but it would have been absurd to enumerate, specially, the powers embraced in the grant. Very different is the case in regard to legislative powers. They are divided between the Federal government and the State governments; which

made it absolutely necessary, in order to draw the line between the delegated and reserved powers, that the one or the other should be carefully enumerated and specified; and, as the former was intended to be but supplemental to the latter,—and to embrace the comparatively few powers which could not be either exercised at all,—or, if at all, could not be so well and safely exercised by the separate governments of the several States,—it was proper that the former, and not the latter, should be enumerated and specified. But, although the treaty-making power is exclusively vested, and without enumeration or specification, in the government of the United States, it is nevertheless subject to several important limitations.

It is, in the first place, strictly limited to questions *inter alios;* that is, to questions between us and foreign powers which require negotiation to adjust them. All such clearly appertain to it. But to extend the power beyond these, be the pretext what it may, would be to extend it beyond its allotted sphere; and, thus, a palpable violation of the constitution. It is, in the next place, limited by all the provisions of the constitution which inhibit certain acts from being done by the government, or any of its departments;—of which description there are many. It is also limited by such provisions of the constitution as direct certain acts to be done in a particular way, and which prohibit the contrary; of which a striking example is to be found in that which declares that, "no money shall be drawn from the treasury but in consequence of appropriations to be

made by law." This not only imposes an important restriction on the power, but gives to Congress, as the law-making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power, whenever money is required to carry a treaty into effect;—which is usually the case, especially in reference to those of much importance. There still remains another, and more important limitation; but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government,—or the objects for which it was formed. Among which, it seems to be settled, that it cannot change or alter the boundary of a State,—or cede any portion of its territory without its consent. Within these limits, all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it.

The greater part of the powers delegated to Congress, relate, directly or indirectly, to one or the other of these two great divisions; that is, to those appertaining to the foreign relations of the States, or their exterior relations with each other. The former embraces the power to declare war; grant letters of marque and reprisals; make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to

make rules for the government and regulation of the land and naval forces; to regulate commerce with foreign nations and the Indian tribes; and to exercise exclusive jurisdiction over all places purchased, with the consent of the States, for forts, magazines, dockyards, &c.

There are only two which apply directly to the exterior relations of the States with each other; the power to regulate commerce between them,—and to establish post-offices and post-roads. But there are two others intimately connected with these relations;—the one, to establish uniform rules of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States;—and the other, to secure, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.

In addition, there is a class which relates to both. They consist of "the power to coin money, regulate the value thereof, and of foreign coins, and to fix the standard of weights and measures,—to provide for the punishment of counterfeiting the securities and current coin of the United States; to provide for calling forth the militia, to suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The two first relate to the power of regulating com-

merce; and the others, principally, to the war power. Indeed, far the greater part of the powers vested in Congress relate to them.

These embrace all the powers expressly delegated to Congress;—except, "the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;—to establish tribunals inferior to the Supreme Court; to provide for calling forth the militia to execute the laws of the Union; to exercise exclusive jurisdiction over such district, —not exceeding ten miles square, as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the government of the United States, or in any department or officer thereof." It is apparent, that all these powers relate to the other powers, and are intended to aid in carrying them into execution; and as the others are embraced in the two great divisions of powers, of which the one relates to their foreign relations, and the other to their exterior relations with each other, it may be clearly inferred that the regulation of these relations constituted the great, if not the exclusive objects for which the government was ordained and established.

If additional proof be required to sustain this inference, it may be found in the prohibitory and miscellaneous provisions of the constitution. A large portion of them are intended, directly, to reg-

ulate the exterior relations of the States with each other, which would have required treaty stipulations between them, had they been separate communities, instead of being united in a federal union. They are, indeed, treaty stipulations of the most solemn character, inserted in the compact of union. And here it is proper to remark, that there is a material difference between the modes in which these two great divisions of power are regulated. The powers embraced by, or appertaining to foreign relations, are left to be regulated by the treaty-making power, or by Congress; and, if by the latter, are enumerated and specifically delegated. They embrace a large portion of its powers. But those relating to the exterior relations of the States among themselves, with few exceptions, are regulated by provisions inserted in the constitution itself. To this extent, it is, in fact, a treaty,—under the form of a constitutional compact,—of the highest and most sacred character. It provides that no tax or duty shall be laid on articles exported from any State; that no preference shall be given, by any regulation of commerce or of revenue, to the ports of one State over those of another; nor shall any vessel bound to, or from one State, be obliged to enter, clear, or pay duties in another; that no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold or silver a tender in payment of debts, or pass any law impairing the obligation of contracts:—that no State shall, without the consent of Congress, lay any import or ex-

port duties, except what may be absolutely necessary for the execution of its inspection laws; and that the net proceeds of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of Congress; no State shall, without the consent of Congress, lay any duty on tonnage; keep troops, or ships of war, in time of peace; enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay; that full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of any other State; that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States; that a person charged in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime; that no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such labor may be due; that the United States shall guarantee to each State in this Union a republican form of government, and shall protect each of them against invasion,—and, on application of the legislature, or of the execu-

tive, when the legislature cannot be convened, against domestic violence.

The other prohibitory provisions, and those of a miscellaneous character, contained in the constitution as ratified, provide against Congress prohibiting the emigration or importation of such persons as any of the States may choose to admit, prior to the year 1808; against the suspension of the writ of *Habeas Corpus;* against passing bills of attainder, and *ex post facto* laws; against laying a capitation or other direct tax, unless in proportion to population, to be ascertained by the census; against drawing money out of the treasury, except in consequence of appropriations made by law; against granting titles of nobility; against persons holding office under the United States, accepting any present or emolument, office or title, from any foreign power, without the consent of Congress; for defining and punishing treason against the United States; for the admission of new States into the Union; for disposing of, and making rules and regulations respecting the territory and other property of the United States; for the amendment of the constitution; for the validity of existing debts and engagements against the United States under the constitution; for the supremacy of the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States; that the Judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding; and that

members of Congress and of the State legislatures, and the executive and judicial officers of the United States, and of the several States, shall be bound by oath, or affirmation, to support the constitution; but that no religious test shall be required to hold office under the United States.

Twelve amendments, or, as they are commonly called, amended articles, have been added since its adoption. They provide against passing laws respecting the establishment of religion, or abridging its free exercise; for the freedom of speech and of the press; for the right of petition; for the right of the people to bear arms; and against quartering soldiers in any house against the consent of the owner; against unreasonable searches, or seizures of persons, papers, and effects; against issuing warrants, but on oath or affirmation; against holding persons to answer for a capital, or other infamous crime, except on presentment or indictment of a grand jury; for a public and speedy trial in all criminal prosecutions, by an impartial jury of the State and district where the offence is charged to have been committed; for the right of jury trial in controversies exceeding twenty dollars; against excessive bail and fines, and against cruel and unusual punishments; against so construing the constitution as that the enumeration of certain powers should be made to disparage or deny those not enumerated; against extending the judicial power of the United States to any suit, in law or equity, against one of the United States, by citizens of another State, or citizens or subjects of a foreign state;

and for the amendment of the constitution in reference to the election of the President and Vice-President. In addition, the amended article, already cited, provides that the powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively or to the people.

It will be manifest, on a review of all the provisions, including those embraced by the amendments, that none of them have any *direct* relation to the immediate objects for which the union was formed; and that, with few exceptions, they are intended to guard against improper constructions of the constitution, or the abuse of the delegated powers by the government,—or, to protect the government itself in the exercise of its proper functions.

In delegating power to the other two departments, the same general principle prevails. Indeed, in their very nature they are restricted, in a great measure, to the execution, each in its appropriate sphere, of the acts, and, of course, the powers vested in the legislative department; and, in this respect, their powers are consequently limited to the two great divisions which appertain to this department. But where either of them have other vested powers, beyond what is necessary for this purpose, it will be found, when I come to enumerate them, that, if they have any reference at all to the division of power between the general government and those of the several States, they directly relate to those appertaining to one or the other of these divisions.

The executive powers are vested in the Presi-

dent. They embrace the powers belonging to him, as commander in chief of the army and navy of the United States, and the militia of the several States, when called into the actual service of the United States;—the right of requiring the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices; of granting reprieves and pardons for offences against the United States,—except in cases of impeachment; of making treaties, by and with the advice and consent of the Senate,—provided two thirds of the Senators present concur; of nominating and, by and with the advice and consent of the Senate, appointing ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments have not been otherwise provided for, and which shall be established by law,—reserving to Congress the right to invest, by law, the appointment of such inferior officers as they may think proper,—in the President alone, in the courts of law, or in the heads of departments; of receiving ambassadors and other public ministers; of convening, on extraordinary occasions, both houses of Congress, or either of them; and, in case of disagreement between them, with respect to the time of adjournment, of adjourning them to such time as he may think proper; of commissioning all the officers of the United States. In addition, it is made his duty to give to Congress information of the state of the Union; and to recommend to their

consideration, such measures as he may deem necessary and expedient; to take care that the laws are faithfully executed; and, finally, he is vested with the power of approving or disapproving bills passed by Congress, before they become laws,—which is called his veto. By far the greater part of these powers and duties appertain to him as chief of the executive department. The principal exception is, the treaty-making power; which appertains exclusively to the foreign relations of the States,—and, consequently, is embraced in that division of the delegated powers; as does, also, the appointment of ambassadors, other ministers and consuls, and the reception of the two former. The other exceptions are merely organic, without reference to any one class or division of powers between the two co-ordinate governments.

The judicial power of the United States is vested in the Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish. The judges hold their offices during good behavior; and have a fixed salary which can neither be increased nor diminished during their continuance in office. Their power extends to all cases in law or equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and marine jurisdiction; to controversies to which the United States shall be a party; to those between two or more States; between citizens of

different States; between citizens of the same State, claiming lands under grants of different States; and between a State and the citizens thereof, and foreign states, citizens or subjects. The fact that, in all cases, where the judicial power is extended beyond what may be regarded its appropriate sphere, it contemplates matters connected directly with the foreign or external relations of the States, rather than those connected with their exterior relations with each other,—strikingly illustrates the position,—that the powers appertaining to the one or the other of these relations, and those necessary to carry them into execution, embrace almost all that have been delegated to the United States. Indeed, on a review of the whole, it may be safely asserted, not only that they embrace almost all of the powers delegated, but that all of the general and miscellaneous provisions (excluding those, of course, belonging to the organism of government, whether they prohibit certain acts, or impose certain duties, —as well as those intended to protect the government, and guard against its abuse of power,) appertain, with few exceptions, to the one or the other of these divisions. For, if the principle which governed in the original division or distribution of powers between the two co-ordinate governments, be that already stated; that is, to delegate such powers only as could not be exercised at all, or as well, or safely exercised by the governments of the States acting separately, and to reserve the residue,—it would be difficult to conceive what others could be embraced in them; since there are none

delegated to either, which do not appertain to the States in their relations with each other, or in their relations with the rest of the world. As to all other purposes, the separate governments of the several States were far more competent and safe, than the general government of all the States. Their knowledge of the local interests and domestic institutions of these respectively, must be much more accurate, and the responsibility of each to their respective people much more perfect. This is so obvious, as to render it incredible, that they would have admitted the interference of a general government in their interior and local concerns, farther than was absolutely necessary to the regulation of their exterior relations with each other and the rest of the world;—or that a general government should have been adopted for any other purpose. To this extent, it was manifestly necessary;—but beyond this, it was not only not necessary, but clearly calculated to jeopard, in part, the ends for which the constitution was adopted;—"to establish justice, insure domestic tranquillity, and secure the blessings of liberty."

Having, now, enumerated the delegated powers, and laid down the principle which guided in drawing the line between them and the reserved powers, the next question which offers itself for consideration is; what provisions does the constitution of the United States, or the system itself, furnish, to preserve this, and its other divisions of power? and whether they are sufficient for the purpose?

The great, original, and primary division, as has

been stated, is that of distinct, independent, and sovereign States. It is the basis of the whole system. The next in order is, the division into the constitution-making and the law-making powers. The next separates the delegated and the reserved powers, by vesting the one in the government of the United States, and the other in the separate governments of the respective States, as co-ordinate governments; and the last, distributes the powers of government between the several departments of each. These divisions constitute the elements of which the organism of the whole system is formed. On their preservation depend its duration and success, and the mighty interests involved in both. I propose to take the divisions in the reverse order to that stated, by beginning with the last, and ending with the first.

The question, then, is,—what provision has the constitution of the United States made to preserve the division of powers among the several departments of the government? And this involves another; whether the departments are so constituted, that each has, within itself, the power of self-protection; the power, by which, it may prevent the others from encroaching on, and absorbing the portion vested in it, by the constitution? Without such power, the strongest would, in the end, inevitably absorb and concentrate the powers of the others in itself, as has been fully shown in the preliminary discourse;—where, also, it is shown that there is but one mode in which this can be prevented; and that is, by investing each division of

power, or the representative and organ of each, with a veto, or something tantamount, in some one form or another. To answer, then, the question proposed, it is necessary to ascertain what provisions the constitution, or the system itself, has made for the exercise of this important power. I shall begin with the legislative department, which, in all popular governments, must be the most prominent, and, at least in theory, the strongest.

Its powers are vested in Congress. To it, all the functionaries of the other two departments are responsible, through the impeaching power; while its members are responsible only to the people of their respective States;—those of the Senate to them in their corporate character as States; and those of the House of Representatives, in their individual character as citizens of the several States. To guard its members more effectually against the control of the other two departments, they are privileged from arrest in all cases, except for treason, felony, and breach of the peace,—during their attendance on the session of their respective houses,—and in going to and returning from the same; and from being questioned, in any other place, for any speech or debate in either house. It possesses besides, by an express provision of the constitution, all the discretionary powers vested in the government, whether the same appertain to the legislative, executive, or judicial departments. It is to be found in the 1st art., 8th sec., 18th clause; which declares that Congress shall have power "to make all laws necessary and proper for carrying into execution the foregoing

powers," (those vested in Congress,) "and all other powers vested, by the constitution, in the government of the United States, or in any department or officer thereof." This clause is explicit. It includes all that are usually called "implied powers;" that is,—powers to carry into effect those expressly delegated; and vests them expressly in Congress, so clearly, as to exclude the possibility of doubt. Neither the judicial department, nor any officer of the government can exercise any power not expressly, and by name, vested in them, either by the constitution, or by an act of Congress: nor can they exercise any implied power, in carrying them into execution, without the express sanction of law. The effect of this is, to place the powers vested in the legislative department, beyond the reach of the undermining process of insidious construction, on the part of any of the other departments, or of any of the officers of government. With all these provisions, backed by its widely extended and appropriate powers,—its security, resulting from freedom of speech in debate,—and its close connection and immediate intercourse with its constituents, the legislative department is possessed of ample means to protect itself against the encroachment on, and absorption of its powers, by the other two departments. It remains to be seen, whether these, in their turn, have adequate means of protecting themselves, respectively, against the encroachments of each other;—as well as of the legislative department. I shall begin with the executive.

Its powers are vested in the President. To pro-

tect them, the constitution, in the first place, makes him independent of Congress, by providing, that he "shall, at stated times, receive for his services, a compensation, which shall be neither increased nor diminished during the period for which he shall have been elected; and that he shall not receive, within that period, any other emolument from the United States, or any one of them."*

He is, in the next place, vested with the power to veto, not only all acts of Congress,—but it is also expressly provided that, "every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him; or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."†

He is vested, in the next place, with the power of nominating and appointing, with the advice and consent of the Senate, all the officers of the government whose appointments are not otherwise provided for by the constitution; except such inferior officers as may be authorized, by Congress, to be appointed by the President alone, or by the courts of law, or heads of departments. I do not add the power of removing officers, the tenure of whose of-

* 2d Art. 1st Sec. 6th clause of the Constitution.

† 1st Art. 7th Sec. 7th clause of the Constitution.

fice is not fixed by the constitution, which has grown into practice; because it is not a power vested in the President by the constitution, but belongs to the class of implied powers; and as such, can only be rightfully exercised and carried into effect by the authority of Congress.

He has, in the next place, the exclusive control of the administration of the government, with the vast patronage and influence appertaining to the distribution of its honors and emoluments; a patronage so great as to make the election of the President the rallying point of the two great parties that divide the country; and the successful candidate, the leader of the dominant party in power, for the time.

He is, besides, commander in chief of the army and navy; and of the militia, when called into the service of the United States. These, combined with his extensive powers, make his veto (which requires the concurrence of two thirds of both houses to overrule it) almost as absolute as it would be without any qualification,—during the term for which he is elected. The whole combined, vests the executive with ample means to protect its powers from being encroached on, or absorbed by the other departments.

Nor are those of the judiciary less ample, for the same purpose, against the two other departments. Its powers are vested in the courts of the United States. To secure the independence of the judges, they are appointed to hold their offices during good behavior; and to receive for their ser-

vices, a compensation which cannot be diminished during their continuance in office. Besides these means for securing their independence, they have, virtually, a negative on the acts of the other departments,—resulting from the nature of our system of government. This requires particular explanation. According to it, constitutions are of paramount authority to laws or acts of the government, or of any of its departments; so that, when the latter come in conflict with the former, they are null and void, and of no binding effect whatever. From this fact it results, that, when a case comes before the courts of the United States, in which a question of conflict between the acts of Congress or any department may arise, the judges are bound, from the necessity of the case, to determine whether, in fact, there is any conflict or not; and if, in their opinion, there be such conflict, to decide in favor of the constitution; and thereby, virtually, to annul or veto the act, as far as it relates to the department or government, and the parties to the suit or controversy. This, with the provisions to secure their independence, gives, not only means of self-protection, but a weight and dignity to the judicial department never before possessed by the judges in any other government of which we have any certain knowledge.

But, however ample may be the means possessed by the several departments to protect themselves against the encroachments of each other, regarded as independent and irresponsible bodies, it by no means follows, that the equilibrium of power, established between them by the constitution, will, neces-

sarily, remain undisturbed. For they are, in fact, neither independent nor irresponsible bodies. They are all representatives of the several States, either in their organized character of governments, or of their people, estimated in federal numbers; and are under the control of their joint majority,—blended, however, in unequal proportions, in the several departments. In order, then, to preserve the equilibrium between the departments, it is indispensable to preserve that between the two majorities which have the power to control them, and to which they are all responsible, directly or indirectly. For it is manifest that if this equilibrium, established by the constitution, be so disturbed, as to give the ascendency to either, it must disturb, or would be calculated to disturb, in turn, the equilibrium between the departments themselves; inasmuch as the weight of the majority which might gain it, would be thrown in favor of the one or the other, as the means of increasing its influence over the government. In order, then, to determine whether the equilibrium between the departments is liable to be disturbed, it is necessary to ascertain what provisions the constitution has made to preserve it between the two majorities, in reference to the several departments; and to determine whether they are sufficient for the purpose intended. I shall, again, commence with the legislative.

In this department the two majorities or elements, of which the government is composed, act separately. Each has its own organ; one the Senate, and the other the House of Representatives: and

each has, through its respective organ, a negative on the other, in all acts of legislation, which require their joint action. This gives to each complete and perfect means to guard against the encroachments of the other. The same is the case in the judiciary. There, the judges, in whom the powers of the department are vested, are nominated by the President, and, by and with the advice and consent of the Senate, appointed by him; which gives each element also a negative on the other; and, of course, like means of preserving the equilibrium established by the constitution between them. But the case is different in reference to the executive department.

The two elements in this department are blended into one, when the choice of a President is made by the electoral college;—which, as has been stated, gives a great preponderance to the element representing the federal population of the several States, over that which represents them in their organized character as governments. To compensate this, a still greater preponderance is given to the latter, in the eventual choice by the House of Representatives. But they have, in neither case, a veto upon the acts of each other; nor any equivalent means to prevent encroachments, in choosing the individual to be vested, for the time, with the powers of the department; and, hence, no means of preserving the equilibrium, as established between them by the constitution. The result has been,—as it ever must be in such cases,—the ascendancy of the stronger element over the weaker. The incipient measure

to effect this was adopted at an early period. The first step was, to diminish the number of candidates, from which the selection should be made, from the five, to the three highest on the list; and,—in order to lessen the chances of a failure to choose by the electoral college,—to provide that the electors, instead of voting for two, without discriminating the offices, should designate which was for the President, and which for the Vice-President. This was effected in the regular way, by an amendment of the constitution. Since then, the constitution, as amended, has been, in practice, superseded, by what is called, *the usage of parties;* that is, by each selecting, informally, persons to meet at some central point, to nominate candidates for the Presidency and Vice-Presidency,—with the avowed object of preventing the election from going into the House of Representatives; and, of course, by superseding the eventual choice on the part of this body, to abolish, in effect, one of the two elements of which the government is constituted, so far, at least, as the executive department is concerned. As it now stands, the complex and refined machinery provided by the constitution for the election of the President and Vice-President, is virtually superseded. The nomination of the successful party, by irresponsible individuals makes, in reality, the choice. It is in this way that the provisions of the constitution, which intended to give equal weight to the two elements in the executive department of the government, have been defeated; and an overwhelming preponderance given to that which is represented in the House of

Representatives, over that which is represented in the Senate.

But the decided preponderance of this element in the executive department, cannot fail greatly to disturb the equilibrium between it and the other two departments, as established by the constitution. It cannot but throw the weight of the more populous States and sections on the side of that department, over which their control is the most decisive; and place the President, in whom its powers are vested for the time, more completely under their control. This, in turn, must place the honors and emoluments of the government, also, more under their control; and, of course, give a corresponding influence over all who aspire to participate in them; and especially over the members, for the time, of the legislative department. Even those, composing the judiciary, for the time, will not be unaffected by an influence so great and pervading.

I come now to examine, what means the constitution of the United States, or the system itself provides, for preserving the division between the delegated and reserved powers. The former are vested in the government of the United States; and the latter, where they have not been reserved to the people of the several States respectively, are vested in their respective State governments. The two, as has been established, stand in the relation of co-ordinate governments; that is, the government of the United States is, in each State, the co-ordinate of its separate government; and taken together, the two make the entire government of each, and of all

the States. On the preservation of this peculiar and important division of power, depend the preservation of all the others, and the equilibrium of the entire system. It cannot be disturbed, without, at the same time, disturbing the whole, with all its parts.

The only means which the constitution of the United States contains or provides for its preservation, consists, in the first place, in the enumeration and specification of the powers delegated to the United States, and the express reservation to the States of all powers not delegated; in the next, in imposing such limitations on both governments, and on the States themselves, in their separate character, as were thought best calculated to prevent the abuse of power, or the disturbance of the equilibrium between the two co-ordinate governments; and, finally, in prescribing that the members of Congress, and of the legislatures of the several States, and all executive and judicial officers of the United States, and of the several States, shall be bound, by oath or affirmation, to support the constitution of the United States. These were, undoubtedly, proper and indispensable means; but that they were, of themselves, deemed insufficient to preserve, undisturbed, this new and important partition of power between co-ordinate governments, is clearly inferrible from the proceedings of the convention, and the writings and speeches of eminent individuals, pending the ratification of the constitution. No question connected with the formation and adoption of the constitution of the

United States, excited deeper solicitude,—or caused more discussion, than this important partition of power. The ablest men divided in reference to it, during these discussions. One side maintained that the danger was, that the delegated would absorb the reserved; while the other not less strenuously contended, that the reserved would absorb the delegated powers. So widely extended was this diversity of opinion, and so deep the excitement it produced, that it contributed more than all other questions combined, to the organization of the two great parties, which arose with the formation of the constitution; and which, finally, assumed the names of "*Federal*" and "*Republican.*" In all these discussions, neither side relied on the provisions of the constitution of the United States, just referred to, as the means of preserving the partition of power between the co-ordinate governments; and thereby, of preventing either from encroaching on, and absorbing the powers of the other. Both looked to the co-ordinate governments, to control each other; and by their mutual action and reaction, to keep each other in their proper spheres. The doubt, on one side, was, whether the delegated, were not too strong for the reserved powers; and, on the other, whether the latter were not too strong for the former. One apprehended that the end would be, *consolidation;* and the other, *dissolution.* Both parties, to make out their case, appealed to the respective powers of the two; compared their relative force, and decided accordingly, as the one or the other appeared the stronger. Both, in the

discussion, assumed, that those who might administer the two co-ordinate governments, for the time, would stand in antagonistic relations to each other, and be ready to seize every opportunity to enlarge their own at the expense of the powers of the other; and rather hoped than believed, that this reciprocal action and reaction would prove so well balanced as to be sufficient to preserve the equilibrium, and keep each in its respective sphere.

Such were the views taken, and the apprehensions felt, on both sides, at the time. They were both right, in looking to the co-ordinate governments for the means of preserving the equilibrium between these two important classes of powers; but time and experience have proved, that both mistook the source and the character of the danger to be apprehended, and the means of counteracting it; and, thereby, of preserving the equilibrium, which both believed to be essential to the preservation of the complex system of government about to be established. Nor is it a subject of wonder, that statesmen, as able and experienced as the leaders of the two sides were, should both fall into error, as to what would be the working of political elements, wholly untried; and which made so great an innovation in governments of the class to which ours belonged. It is clear, from the references so frequently made to previous confederacies, in order to determine how the government about to be established, would operate, that the framers of the constitution themselves, as well as those who took an active part in discussing the question of its adop-

tion, were far from realizing the magnitude of the change which was made by it in governments of that form. Had this been fully realized, they would never have assumed that those who administered the government of the United States, and those of the separate States, would stand in hostile relations to each other; or have believed that it would depend on the relative force of the powers delegated and the powers reserved, whether either would encroach on, and absorb the other;—an assumption and belief which experience has proved to be utterly unfounded. The conflict took, from the first, and has continued ever since to move in, a very different direction. Instead of a contest for power between the government of the United States, on the one side, and the separate governments of the several States, on the other,—the real struggle has been to obtain the control of the former;—a struggle in which both States and people have united: And the result has shown that, instead of depending on the relative force of the delegated and reserved powers, the latter, in all contests, have been brought in aid of the former, by the States on the side of the party in the possession and control of the government of the United States,—and by the States on the side of the party in the opposition, in their efforts to expel those in possession, and to take their place. There must then be at all times,—except in a state of transition of parties, or from some accidental cause,—a majority of the several States, and of their people, estimated in federal numbers, on the side of those in power; and, of course, on

the side of the delegated powers and the government of the United States. Its real authority, therefore, instead of being limited to the delegated powers alone, must, habitually, consist of these, united with the reserved powers of the joint majority of the States, and of their population, estimated in federal numbers. Their united strength must necessarily give to the government of the United States, a power vastly greater than that of all the co-ordinate governments of the States on the side of the party in opposition. It is their united strength, which makes it one of the strongest ever established; greatly stronger than it could possibly be as a national government. And, hence, all conclusions, drawn from a supposed antagonism between the delegated powers, on the one hand, and the reserved powers, on the other, have proved, and must ever prove utterly fallacious. Had it, in fact, existed, there can now be no doubt, that the apprehensions of those, who feared that the reserved powers would encroach on and absorb the delegated, would have been realized, and dissolution, long since, been the fate of the system: for it was this very antagonism which caused the weakness of the confederation, and threatened the dissolution of the Union. The difference between it and the present government, in this respect, results from the fact, that the States, in the confederation, had but few and feeble motives to form combinations, in order to obtain the control of its powers; because neither the State governments, nor the citizens of the several States were subject to its control. Hence, they were more dis-

posed to elude its requisitions, and reserve their means for their own control and use, than to enter into combinations to control its councils. But very different is the case in their existing confederated character. The present government possesses extensive and important powers; among others, that of carrying its acts into execution by its own authority, without the intermediate agency of the States. And, hence, the principal motives to get the control of the government, with all its powers and vast patronage; and for this purpose, to form combinations as the only means by which it can be accomplished. Hence, also, the fact, that the present danger is directly the reverse of that of the confederacy. The one tended to dissolution,—the other tends to consolidation. But there is this difference between these tendencies. In the former, they were far more rapid,—not because they were stronger, but because there were few or no impediments in their way; while in the latter, many and powerful obstacles are presented. In the case of the confederacy, the antagonistic position which the States occupied in respect to it,—and their indifference to its acts, after the acknowledgment of their independence, led to a non-compliance with its requisitions;—and this, without any active measure on their parts, was sufficient, if left to itself, to have brought about a dissolution of the Union, from its weakness, at no distant day. But such is not the case under the present system of government. To form combinations in order to get the control of the government, in a country of such vast extent,—and

consisting of so many States, having so great a variety of interests, must necessarily be a slow process, and require much time, before they can be firmly united, and settle down into two organized and compact parties. But the motives to obtain this control are sufficiently powerful to overcome all these impediments; and the formation of such parties is just as certain to result from the action of political affinities and antipathies, as the formation of bodies, where different elements in the material world, having mutual attraction and repulsion, are brought in contact. Nor is the organization of the government of the United States, which requires the concurrence of the two majorities to control it,—though intended for the purpose,—sufficient, of itself, to prevent it. The same constitution of man, which would, in time, lead to the organization of a party, consisting of a simple majority,—if such had the power of control,—will, just as certainly, in time, form one, consisting of the two combined. The only difference is, that the one would be formed more easily, and in a shorter time than the other. The motives are sufficiently strong to overcome the impediments in either case.

In forming these combinations, which, in fact, constitute the two parties, circumstances must, of course, exert a powerful influence. Similarity of origin, language, institutions, political principles, customs, pursuits, interests, color, and contiguity of situations,—all contribute to facilitate them: while their opposites necessarily tend to repel them, and, thus, to form an antagonistic combination and

party. In a community of so great an extent as ours, contiguity becomes one of the strongest elements in forming party combinations, and distance one of the strongest elements in repelling them. The reason is, that nothing tends more powerfully to weaken the social or sympathetic feelings, than remoteness; and, in the absence of causes calculated to create aversion, nothing to strengthen them more, than contiguity. We feel intensely the sufferings endured under our immediate observation;—when we would be almost indifferent, were they removed to a great distance from us. Besides, contiguity of situation usually involves a similarity of interests;—especially, when considered in reference to those more remote,—which greatly facilitates the formation of local combinations and parties in a country of extensive limits. If to this, we add other diversities,—of pursuits, of institutions, origin, and the like, which not unusually exist in such cases, parties must almost necessarily partake, from the first, more or less, of a local character: and, by an almost necessary operation, growing out of the unequal fiscal action of the government, as explained in the preliminary discourse, must become entirely so, in the end, if not prevented by the resistance of powerful causes. We accordingly find, that such has been the case with us, under the operation of the present government. From the first, they assumed, in some degree, this character; and have since been gradually tending more and more to this form, until they have become, almost entirely, sectional. When they shall have become so entirely,—(which

must inevitably be the case, if not prevented,)—when the stronger shall concentrate in itself both the majorities which form the elements of the government of the United States,—(and this, it must shortly do,)—every barrier, which the constitution, and the organism of the government oppose to one overruling combination of interests, will have been broken down, and the government become as absolute, as would be that of the mere numerical majority; unless, indeed, the system itself, shall be found to furnish some means sufficiently powerful to resist this strong tendency, inherent in governments like ours, to absorb and consolidate all power in its own hands.

What has been stated is sufficient to show, that no such means are to be found in the constitution of the United States, or in the organism of the government. Nor can they be found in the right of suffrage; for it is through its instrumentality that the party combinations are formed. Neither can they be found in the fact, that the constitution of the United States is a written instrument; for this, of itself, cannot possibly enforce the limitations and restrictions which it imposes, as has been fully shown in the preliminary discourse. Nor can they be enforced, and the government held strictly to the sphere assigned, by resorting to a strict construction of the constitution;—for the plain reason, that the stronger party will be in favor of a liberal construction; and the strict construction of the minority can be of no avail against the liberal construction of the majority;—as has also been shown in the

same discourse. Nor can they be found in the force of public opinion,—operating through the Press; for it has been, therein, also shown, that its operation is similiar to that of the right of suffrage; and that its tendency, with all its good effects in other respects, is to increase party excitement, and to strengthen the force of party attachments and party combinations, in consequence of its having become a party organ and the instrument of party warfare. Nor can the veto power of the President, or the power of the Judges to decide on the constitutionality of the acts of the other departments, furnish adequate means to resist it,—however important they may be, in other respects, and in particular instances;—for the plain reason, that the party combinations which are sufficient to control the two majorities constituting the elements of the government of the United States, must, habitually, control all the departments;—and make them all, in the end, the instruments of encroaching on, and absorbing the reserved powers; especially the executive department,—since the provisions of the constitution, in reference to the election of the President and Vice-President, have been superseded, and their election placed, substantially, under the control of the single element of federal numbers. But if none of these can furnish the means of effective resistance, it would be a waste of time to undertake to show, that freedom of speech, or the trial by jury, or any guards of the kind, however indispensable as auxiliary means, can, of themselves, furnish them.

If, then, neither the constitution, nor any thing

appertaining to it, furnishes means adequate to prevent the encroachment of the delegated on the reserved powers, they must be found in some other part of the system, if they are to be found in it at all. And, further;—if they are to be found there, it must be in the powers not delegated; since it has been shown that they are not to be found in those delegated, nor in any thing appertaining to them;—and the two necessarily embrace all the powers of the whole system. But, if they are to be found in the reserved powers, it must be in those vested in the separate governments of the several States, or in those retained by the people of the several States, in their sovereign character;—that character in which they ordained and established the constitution and government; and, in which, they can amend or abolish it;—since all the powers, not delegated, are expressly reserved, by the 10th Article of Amendments, to the one or the other. In one, then, or the other of these, or in both, the means of resisting the encroachments of the powers delegated to the United States, on those reserved to the States respectively, or to the people thereof,—and thereby to preserve the equilibrium between them, must be found, if found in the system at all. Indeed, in one constituted as ours, it would seem neither reasonable nor philosophical to look to the government of the United States, in which the delegated powers are vested, for the means of resisting encroachments on the reserved powers. It would not be reasonable; because it would be to look for protection against danger, to the quarter

from which it was apprehended, and from which only it could possibly come. It would not be philosophical; because it would be against universal analogy. All organic action, as far as our knowledge extends,—whether it appertain to the material or political world, or be of human or divine mechanism,—is the result of the reciprocal action and reaction of the parts of which it consists. It is this which confines the parts to their appropriate spheres, and compels them to perform their proper functions. Indeed, it would seem impossible to produce organic action by a single power,—and that it must ever be the result of two or more powers, mutually acting and reacting on each other. And hence the political axiom,—that there can be no constitution, without a division of power, and no liberty without a constitution. To this a kindred axiom may be added;—that there can be no division of power, without a self-protecting power in each of the parts into which it may be divided; or in a superior power to protect each against the others. Without a division of power there can be no organism; and without the power of self-protection, or a superior power to restrict each to its appropriate sphere, the stronger will absorb the weaker, and concentrate all power in itself.

The members, then, of the convention, which framed the constitution, and those who took an active part in the question of its adoption, were not wrong in looking to this reciprocal action and re action, between the delegated and the reserved powers;—between the government of the United

States and the separate governments of the several States,—as furnishing the means of resisting the encroachments of the one or the other;—however much they may have erred as to the *mode* in which they would mutually act. No one, indeed, seems, at the time, to have formed any clear or definite conception of the manner in which, a division so novel, would act, when put into operation. All seem to have agreed that there would be conflict between the two governments. They differed only as to which would prove the stronger; yet indulging the hope that their respective powers were so well adjusted, that neither would be able to prevail over the other. Under the influence of this hope, and the diversity of opinion entertained, the framers of the constitution contented themselves with drawing, as strongly as possible, the line of separation between the two powers;—leaving it to time and experience to determine where the danger lay; to develop whatever remedy the system might furnish to guard against it;—and, if it furnished none, they left it to those, who should come after them, to supply the defect. We now have the benefit of these: Time and Experience have shown fully, where the danger lies, and what is its nature and character. They have established, beyond all doubt, that the antagonism relied on,—as existing in theory, between the government of the United States, on the one hand, and all the separate State governments, on the other, has proved to be, in practice, between the former, supported by a majority of the latter, and of their population, estimated in federal numbers,—

and a minority of the States and of their population, estimated in the same manner. And, consequently, that the government of the United States, instead of being the weaker, as was believed by many, has proved to be immeasurably the stronger; especially, since the two majorities constituting the elements of which it is composed, have centred in one of the two great sections which divide the Union. The effect has been, to give to this section entire and absolute control over the government of the United States; and through it, over the other section, on all questions, in which their interests or views of policy may come in conflict. The system, in consequence of this, instead of tending towards dissolution from weakness, tends strongly towards consolidation from exuberance of strength:—so strongly, that, if not opposed by a resistance proportionally powerful, the end must be its destruction,—either by the bursting asunder of its parts, in consequence of the intense conflict of interest, produced by being too closely pressed together, or by consolidating all the powers of the system in the government of the United States, or in some one of its departments,—to be wielded with despotic force and oppression. The present system must be preserved in its integrity and full vigor; for there can be no other means,—no other form of government, save that of absolute power, which can govern and keep the whole together. Disregarding this, the only alternatives are,—a government in form and in action, absolute and irresponsible,—a consolidation of the system under the existing form, with powers equally despotic and oppressive,—or a dissolution.

With these preliminary remarks, I shall next proceed to consider the question,—whether the reserved powers, if fully developed and brought into action, are sufficient to resist this powerful and dangerous tendency of the delegated, to encroach on them? or, to express the same thing in a different form,—whether the separate government of a State, and its people in their sovereign character, to whom all powers, not delegated to the United States, appertain, can,—one or both,—rightfully oppose sufficient resistance to the strong tendency on the part of the government of the latter, to prevent its encroachment. I use the expression,—"a State and its people,"—because the powers not delegated to the United States, are reserved to each State respectively, or to its people; and, of course, it results that, whatever resistance the reserved powers can oppose to the delegated, must, to be within constitutional limits, proceed from the government and the people of the several States, in their separate and individual character.

The question is one of the first magnitude;—and deserves the most serious and deliberate consideration. I shall begin with considering,—what means the government of a State possesses, to prevent the government of the United States from encroaching on its reserved powers? I shall, however, pass over the right of remonstrating against its encroachments; of adopting resolutions against them, as unconstitutional; of addressing the governments of its co-States, and calling on them to unite and co-operate in opposition to them; and of

instructing its Senators in Congress, and requesting its members of the House of Representatives, to oppose them,—and other means of a like character; not because they are of no avail, but because they are utterly impotent to arrest the strong and steady tendency of the government of the United States to encroach on the reserved powers; however much they may avail, in particular instances. To rely on them to counteract a tendency so strong and steady, would be as idle as to rely on reason and justice, as the means to prevent oppression and abuse of power on the part of government, without the aid of constitutional provisions. Nothing short of a negative, absolute or in effect, on the part of the government of a State, can possibly protect it against the encroachments of the government of the United States, whenever their powers come in conflict. That there is, in effect, a mutual negative on the part of each, in such cases, is what I next propose to show.

It results from their nature; from the relations which subsist between them; and from a law universally applicable to a division of power. I will consider each in the order stated.

That they are both governments, and, as such, possess all the powers appertaining to government, within the sphere of their respective powers,—the one as fully as the other,—cannot be denied. Nor can it be denied that, among the other attributes of government, they possess the right to judge of the extent of their respective powers, as it regards each other. In addition to this, it may be affirmed as

true, that governments, in full possession of all the powers appertaining to government, have the right to enforce their decisions as to the extent of their powers, against all opposition. But the case is different in a system of governments like ours,—where the powers appertaining to government are divided,—a portion being delegated to one government, and a portion to another;—and the residue retained by those who ordained and established both. In such case, neither can have the right to enforce its decisions, as to the extent of its powers, when a conflict occurs between them in reference to it; because it would be, in the first place, inconsistent with the relation in which they stand to each other as co-ordinates. The idea of co-ordinates, excludes that of superior and subordinate, and, necessarily, implies that of equality. But to give either the right, not only to judge of the extent of its own powers, but, also, of that of its co-ordinate, and to enforce its decision against it, would be, not only to destroy the equality between them, but to deprive one of an attribute,—appertaining to all governments,—to judge, in the first instance, of the extent of its powers. The effect would be to raise one from an equal to a superior;—and to reduce the other from an equal to a subordinate; and, by divesting it of an attribute appertaining to government, to sink it into a dependent corporation. In the next place, it would be inconsistent with what is meant by a division of power; as this necessarily implies, that each of the parties, among whom it may be partitioned, has an equal right to its respec-

tive share, be it greater or smaller; and to judge as to its extent, and to maintain its decision against its copartners. This is what constitutes, and what is meant by, a division of power. Without it, there could be no division. To allot a portion of power to one, and another portion to another, and to give either the exclusive right to say, how much was allotted to each, would be no division at all. The one would hold as a mere tenant at will,—to be deprived of its portion whenever the other should choose to assume the whole. And, finally, because, no reason can be assigned, why one should possess the right to judge of the extent of its powers, and to enforce its decision, which would not equally apply to the other co-ordinate government. If one, then, possess the right to enforce its decision, so, also, must the other. But to assume that both possess it, would be to leave the umpirage, in case of conflict, to mere brute force; and thus to destroy the equality, clearly implied by the relation of co-ordinates, and the division between the two governments. In such case, force alone would determine which should be the superior, and which the subordinate; which should have the exclusive right of judging, both as to the extent of its own powers and that of its co-ordinates;—and which should be deprived of the right of judging as to the extent of those of either;—which should, and which should not possess any other power than that which its co-ordinate,—now raised to its superior,—might choose to permit it to exercise. As the one or the other might prove the stronger, consolidation or disunion

would, inevitably, be the consequence; and which of the twain, no one who has paid any attention to the working of our system, can doubt. An assumption, therefore, which would necessarily lead to the destruction of the whole system in the end, and the substitution of another, of an entirely different character, in its place,—must be false.

But, if neither has the exclusive right, the effect, where they disagree as to the extent of their respective powers, would be, a mutual negative on the acts of each, when they come into conflict. And the effect of this again, would be, to vest in each the power to protect the portion of authority allotted to it, against the encroachment of its co-ordinate government. Nothing short of this can possibly preserve this important division of power, on which rests the equilibrium of the entire system.

The party, in the convention, which favored a national government, clearly saw that the separate governments of the several States would have the right of judging of the extent of their powers, as between the two governments, unless some provision should be adopted to prevent it. This is manifest from the many and strenuous efforts which they made to deprive them of the right, by vesting the government of the United States with the power to veto or overrule their acts, when they might be thought to come in conflict with its powers. These efforts were made in every stage of the proceedings of the convention, and in every conceivable form,—as its journals will show.

The very first project of a constitution submitted

to the convention, (Gov. Randolph's,) contained a provision, "to grant power to negative all acts contrary, in the opinion of the national legislature, to the articles,—or any treaty, subsisting under the power of the Union; and to call forth the force of the Union, against any member of the Union, failing to fulfil its duties, under the articles thereof."

The next plan submitted, (Mr. Charles Pinckney's,) contained a provision that,—"the legislature of the United States shall have power to revise the laws that may be supposed to impinge the powers exclusively delegated, by this constitution, to Congress; and to negative and annul such as do." The next submitted, (Mr. Patterson's,) provided that, "if any State, or body of men in any State, shall oppose, or prevent the carrying into execution, such acts, or treaties," (of the Union,) "the federal executive shall be authorized to call forth the forces of the confederated States, or so much thereof, as shall be necessary, to enforce or compel obedience to such acts, or the observance of such treaties." The committee of the whole, to whom was referred Mr. Randolph's project, reported a provision, that the jurisdiction of the national judiciary should extend to all "questions, which involved the national peace and harmony." The next project, (Mr. Hamilton's,) —after declaring all the laws of the several States, which were contrary to the constitution and the laws of the United States, to be null and void,— provides, that, "the better to prevent such laws from being passed, the Governor, or President of each State, shall be appointed by the general gov-

ernment; and shall have a negative upon the laws, about to be passed in the State of which he is Governor or President." This was followed by a motion, made by Mr. C. Pinckney, to vest in the legislature of the United States the power, "to negative all laws, passed by the several States, interfering, in the opinion of the legislature, with the general interest and harmony of the Union; provided that two thirds of each house assent to the same."

It is not deemed necessary to trace, through the journals of the convention, the history and the fate of these various propositions. It is sufficient to say,—that they were all made, and not one adopted; although perseveringly urged by some of the most talented and influential members of the body, as indispensable to protect the government of the United States, against the apprehended encroachments of the governments of the several States. The fact that they were proposed and so urged, proves, conclusively, that it was believed, even by the most distinguished members of the national party, that the former had no right to enforce its measures against the latter, where they disagreed as to the extent of their respective powers,—without some express provision to that effect; while the refusal of the convention to adopt any such provision, under such circumstances, proves, equally conclusively, that it was opposed to the delegation of such powers to the government, or any of its departments, legislative, executive, or judicial, in any form whatever.

But, if it be possible for doubt still to remain, the ratification of the constitution by the convention of Virginia, and the 10th amended article, furnish proofs in confirmation so strong, that the most skeptical will find it difficult to resist them.

It is well known, that there was a powerful opposition to the adoption of the constitution of the United States. It originated in the apprehension, that it would lead to the consolidation of all power in the government of the United States;—notwithstanding the defeat of the national party, in the convention,—and the refusal to adopt any of the proposals to vest it with the power to negative the acts of the governments of the separate States. This apprehension excited a wide and deep distrust, lest the scheme of the national party might ultimately prevail, through the influence of its leaders, over the government about to be established. The alarm became so great as to threaten the defeat of the ratification by nine States,—the number necessary to make the constitution binding between the States ratifying it. It was particularly great in Virginia;—on whose act, all sides believed the fate of the instrument depended. Before the meeting of her convention, seven States had ratified. It was generally believed that, of the remaining States, North Carolina and Rhode Island would not ratify; and New-York was regarded so doubtful, that her course would, in all probability, depend on the action of Virginia. Her refusal, together with that of Virginia, would have defeated the adoption of the constitution. The

struggle, accordingly, between the two parties in her convention, was long and ardent. The magnitude of the question at issue, called out the ablest and most influential of her citizens on both sides; and elicited the highest efforts of their talents. The discussion turned, mainly, on the danger of consolidation from construction; and was conducted with such ability and force of argument, by the opponents of ratification, that it became necessary, in order to obtain a majority for it, to guard against such construction, by incorporating in the act of ratification itself, provisions to prevent it. The act is in the following words: "We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the general assembly, and now met in convention, having fully and freely investigated and discussed the proceedings of the federal convention, and being prepared as well as the most mature deliberation hath enabled us to decide thereon, do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them and at their will: that, therefore, no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate, or House of Representatives, acting in any capacity, by the President or any department, or officer of the United States, except

in those instances in which power is given by the constitution for those purposes; and that among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States.

" With these impressions,—with a solemn appeal to the Searcher of hearts for the purity of our intentions, and under the conviction, that, whatsoever imperfections may exist in the constitution ought rather to be examined in the mode prescribed therein, than to bring the Union into danger by delay, with the hope of obtaining amendments, previous to the ratification: We, the said delegates, in the name and behalf of the people of Virginia, do by these presents, assent to and ratify the constitution, &c."—concluding in the usual form.

Such is the recorded construction, which that great and leading State placed on the constitution, in her act of ratification. That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her convention abundantly prove. It was done effectually, as far as it depended on words. It declares that all powers granted by the constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be cancelled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any de-

partment, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers; and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States. Now, when it is taken into consideration, that the right of the separate governments of the several States is as full and perfect to protect their own powers, as is that of the government of the United States to protect those which are delegated to it; and, of course, that it belongs to their reserved powers; that all the attempts made in the convention which framed the constitution, to deprive them of it, by vesting the latter with the power to overrule the right, equally failed; that Virginia could not be induced to ratify without incorporating the true construction she placed on it in her act of ratification; that, without her ratification, it would not, in all probability, have been adopted; and that it was accepted by the other States, subject to this avowed construction, without objection on their part;—it is difficult to resist the inference, that their acceptance, under all these circumstances, was an implied admission of the truth of her construction; and that it makes it as binding on them as if it had been inserted in the constitution itself.

But her convention took the further precaution of having it inserted, in substance, in that instrument. Those who composed it were wise, experi-

enced, and patriotic men; and knew full well, how difficult it is to guard against the abuses of construction. They accordingly proposed, as an amendment of the constitution, the substance of her construction. It is in the following words: "That each State in the Union shall respectively retain every power, jurisdiction, and right, which is not, by the constitution, delegated to the Congress of the United States, or to the departments of the federal government." This was modified and proposed, as an amendment, in the regular constitutional form; and was ratified by the States. It constitutes the 10th amended article, which has already been quoted at length. It is worthy of note, that Massachusetts, New Hampshire, and South Carolina, proposed, when they ratified the constitution, amendments similar in substance, and with the same object:—clearly showing how extensively the alarm felt by Virginia, had extended; and how strong the desire was to guard against the evil apprehended.

Such, and so convincing are the arguments going to show, that the government of the United States has no more right to enforce its decisions against those of the separate governments of the several States, where they disagree as to the extent of their respective powers, than the latter have of enforcing their decisions in like cases. They both stand on equal grounds, in this respect. But as convincing as are these arguments, there are many, who entertain a different opinion;—and still affirm that the government of the United States possesses the right, fully, absolutely, and exclusively.

In support of this opinion, they rely, in the first place, on the second section of the sixth article, which provides that,—"This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."

It is sufficient, in reply, to state, that the clause is declaratory; that it vests no new power whatever in the government, or in any of its departments. Without it, the constitution and the laws made in pursuance of it, and the treaties made under its authority, would have been the supreme law of the land, as fully and perfectly as they now are; and the judges in every State would have been bound thereby, any thing in the constitution or laws of a State, to the contrary notwithstanding. Their supremacy results from the nature of the relation between the federal government, and those of the several States, and their respective constitutions and laws. Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. But this supremacy is not an absolute supremacy. It is limited in extent

and degree. It does not extend beyond the delegated powers;—all others being reserved to the States and the people of the States. Beyond these the constitution is as destitute of authority, and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption. And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the constitution, or under the authority of the United States; which can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction; not even that, which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it,—or in the government of the United States,—or in any of its departments, or officers. This power, comprehensive as it is, is, nevertheless, subject to two important restrictions; one, that the law must be necessary,—and the other, that it must be proper.

To understand the import of the former, it must be borne in mind, that no power can execute itself. They all require means, and the agency of government, to apply them. The means themselves may, indeed, be regarded as auxiliary powers. Of these, some are so intimately connected with the principal power, that, without the aid of one, or all of them, it could not be carried into execution;—and, of course, without them, the power itself would be nugatory. Hence, they are called implied powers; and it is to this description of incidental or auxiliary

powers, that Congress is restricted, in passing laws, necessary to carry into execution the powers expressly delegated.

But the law must, also, be proper as well as necessary, in order to bring it within its competency. To understand the true import of the term in this connection, it is necessary to bear in mind, that even the implied powers themselves are subject to important conditions, when used as means to carry powers or rights into execution. Among these the most prominent and important is, that they must be so carried into execution as not to injure others; and, as connected with, and subordinate to this,—that, where the implied powers, or means used, come in conflict with the implied powers, or means used by another, in the execution of the powers or rights vested in it, the less important should yield to the more important,—the convenient, to the useful; and both to health and safety;—because it is *proper they should do so.* Both rules are universal, and rest on the fundamental principles of morals.

Such is the true import of the term "proper," superadded to "necessary," when applied to this important question. And hence, when a law of Congress, carrying into execution one of the delegated powers, comes into conflict with a law of one of the States, carrying its reserved powers into execution, it does not necessarily follow that the latter must yield to the former, because the laws made in pursuance of the constitution, are declared to be the supreme law of the land: for the restriction imposed by the term "proper," takes it out of the

power of Congress, even where the implied power is necessary, and brings it under the operation of those fundamental rules of universal acceptation, to determine which shall yield. Without this restriction, most of the reserved powers of the States,—and, among them, those relating to their internal police, including the health, tranquillity, and safety of their people—might be made abortive, by the laws passed by Congress, to carry into effect the delegated powers; especially in regard to those regulating commerce, and establishing post-offices and post-roads.

The alterations finally made in this clause of the constitution, compared with it as originally reported by the committee on detail, deserve notice,—as shedding considerable light on its phraseology and objects. As reported by that committee, it was in the following words:—"The acts of the legislature of the United States, made in pursuance of this constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the Judges of the several States shall be bound thereby, in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding." After a long discussion of the plan of the constitution, as reported by this committee; and after many alterations were made, the whole, as amended, was referred to the committee of revision, or "*style*," as it was also called. This particular clause had received no amendment; and, of course, was referred as reported by the commit-

tee on detail. The committee of revision, or style, reported it back as it now stands. On comparing the two, it will be found, that the word "constitution," which was omitted in the plan of the committee on detail, is added, as a part of the supreme law of the land; that the expression, "the acts of the legislature of the United States," is changed into "laws of Congress," and "land" substituted in lieu of, "several States and of their citizens and inhabitants." These modifications of phraseology were, doubtless, introduced to make the clause conform to what was believed to be the views of the convention, as disclosed in the discussion on the plan reported by the committee on detail, and to improve the manner of expression; for such were plainly the objects of referring the plan, as amended, to the committee of revision and style. "Constitution" was doubtless added, because, although a compact as between the States, it is a law,—and the highest law,—in reference to the citizens and inhabitants of the several States, regarded individually. The substitution of "Congress," for "the legislature of the United States," requires no explanation. It is a mere change of phraseology. For the substitution of "land," in place of the "several States and their citizens and inhabitants," no reason is assigned, so far as I can discover; but one will readily suggest itself on a little reflection. As the expression stood in the plan reported by the committee on detail, the supremacy of the acts of the legislature of the United States, and of treaties made under their authority, was limited to the "several States, and their citizens

and inhabitants;" and, of course, would not have extended over the *territorial possessions* of the United States; or, as far as their authority might otherwise extend. It became necessary, therefore, to give them a wider scope; especially after the word, "constitution," was introduced in connection with, "laws of the United States;" as their authority never can extend beyond the limits, to which it is carried by the constitution. As far as this extends, their authority extends; but no further. To give to the constitution and the laws and treaties made in pursuance thereof, a supremacy coextensive with these limits, it became necessary to adopt a more comprehensive expression than that reported by the committee on detail; and, hence, in all probability, the adoption of that substituted by the committee of revision and style;—"the supreme law of the land," being deemed the more appropriate.

Such are the limitations imposed on the authority of the constitution, and laws of the United States, and treaties made under their authority, regarded as the supreme law of the land. To carry their supremacy beyond this,—and to extend it over the reserved powers, in any form or shape, or through any channel,—be it the government itself or any of its departments,—would finally destroy the system by consolidating all its powers in the hands of the one or the other.

The limitation of their supremacy, *in degree*, is not less strongly marked, than it is *in extent.* While they are supreme, within their sphere, over the constitutions and laws of the several States,—

the constitution of the United States, and all that appertains to it, are subordinate to the power which ordained and established it;—as much so, as are the constitutions of the several States, and all which appertains to them, to the same creative power. In this respect, as well as their supremacy in regard to each other, in their respective spheres, they stand on the same level. Neither has any advantage, in either particular, over the other.

Those who maintain that the government of the United States has the right to enforce its decisions as to the extent of the powers delegated to it, against the decisions of the separate governments of the several States as to the extent of the reserved powers, in case of conflict between the two, —next rely, in support of their opinion, on the 2d sec. 3d art. of the constitution,—which is in the following words: "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies, to which the United States shall be a party;—to controversies between two or more States; —between a State and the citizens of another State;—between citizens of different States;— between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign states, citizens or subjects."

It will be sufficient, in reply, to show, that this section contains no provisions whatever, which would authorize the judiciary to enforce the determination of the government, against that of the government of a State, in such cases.

It may be divided into two parts; that which gives jurisdiction to the judicial power, in reference to the *subject matter*, and that which gives it jurisdiction, in reference to the *parties litigant*. The first clause, which extends it, "to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority," embraces the former; and the residue of the section, the latter.

It is clear on its face, that the object of the clause was, to make the jurisdiction of the judicial power, commensurate with the authority of the constitution and the several departments of the government, as far as it related to cases arising under them,—and no further. Nor is it less manifest that the word "*cases*," being a well-defined technical term, is used in its proper legal sense;—and embraces only such questions as are of a judicial character;—that is, questions in which the parties litigant are amenable to the process of the courts. Now, as there is nothing in the constitution which vests authority in the government of the United States, or any of its departments, to enforce its decision against that of the separate government of a State; and nothing in this clause which makes the several States amenable to its process, it is

manifest that there is nothing in it, which can possibly give the judicial power authority to enforce the decision of the government of the United States, against that of a separate State, where their respective decisions come into conflict. If, then, there be any thing that authorizes it, it must be contained in the remainder of the section, which vests jurisdiction with reference to the parties litigant. But this contains no provision which extends the jurisdiction of the judicial power to questions involving such conflict between the two co-ordinate governments,—either express or implied;—as I shall next proceed to show.

It will not be contended that either the government of the United States, or those of the separate States are amenable to the process of the courts; unless made so by their consent respectively; for no legal principle is better established than that, a government, though it may be plaintiff in a case, or controversy, cannot be made defendant, or, in any way, amenable to the process of the courts, without its consent. That there is no *express* provision in the section, by which, either of the co-ordinate governments can be made defendants, or amenable to the process of the courts, in a question between them, is manifest.

If, then, there be any, it must be *implied* in some one of its provisions: and it is, accordingly, contended, that it is *implied* in the clause, which provides that the judicial power shall extend, "to controversies to which the United States shall be a party." This clause, it is admitted, clearly extends

the jurisdiction of the judiciary to all controversies to which the United States are a party, as plaintiff or defendant, by their consent. So far, it is not a matter of implication, but of express provision. But the inquiry is, does it go further, and, by implication, authorize them to make a State a defendant without its consent, in a question or controversy between it and them? It contains not a word or syllable that would warrant such an implication; and any construction which could warrant it, would authorize a State, or an individual, to make the United States a party defendant, in a controversy between them, without their consent.

There is, not only nothing to warrant such construction, but much to show that it is utterly unwarrantable. Nothing, in the first place, short of the strongest implication, is sufficient to authorize a construction, that would deprive a State of a right so important to its sovereignty, as that of not being held amenable to the process of the courts; or to be made a defendant, in any case or controversy whatever, without its consent;—more especially, in one between it and a coequal government, where the effect would necessarily be, to reduce it from an equal to a subordinate station.

It would, in the next place, be contrary to the construction placed on a similar clause in the same section, by an authority higher than that of the judicial, or of any other, or of all the departments of the government taken together. I refer to the last clause, which provides that the judicial power shall extend to controversies, "between a State or citi-

zens thereof, and foreign states, citizens or subjects." It would be much more easy to make out something like a plausible argument in support of the position, that a State might be made defendant and amenable to the process of the courts of the United States, under this clause, than under that in question. In the former, the States are not even named. They can be brought in only by implication, and then, by another implication, divested of a high sovereign right: and this, too, without any assignable reason for either. Here they are not only named, but the other parties to the controversies are also named; without stating which shall be plaintiff, or which defendant. This was left undefined; and, of course, the question, whether the several States might not be made defendants as well as plaintiffs, in controversies between the parties, left open to construction;—and in favor of the implication, a very plausible reason may be assigned. The clause puts a State and its citizens on the same ground. In the controversies, to which it extends the judicial power, the State and its citizens stand on one side, and foreign states, citizens and subjects, on the other. Now as foreign states, citizens, or subjects may, under its provisions, make the citizens of a State defendants, in a controversy between them, it would not be an unnatural inference, that the State might also be included. Under this construction, an action was, in fact, commenced in the courts of the United States, against one of the States. The States took the alarm; and, in the high sovereign character, in which they ordained and

established the constitution, declared that it should "not be so construed, as to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state."*

If additional reasons could be thought necessary to sustain a conclusion supported by arguments so convincing, they might be found in the fact, that as long as the government has existed,—and as numerous as have been the questions between the United States and many of the several States,—the former never have attempted, in any of them, to bring the latter into the courts of the United States. If to this it be added, that all attempts made in the convention, to extend the judicial power, "to all questions, which involved the national peace and harmony;"—or which might have the effect of subjecting the several States to its jurisdiction, failed,—the conclusion against all constructive efforts, having the same objects in view, and based on any one of the clauses of this section, is irresistible.

It is, in the last place, contended,—that the Supreme Court of the United States has the right to decide on the constitutionality of all laws; and, in virtue of this, to decide, in the last resort, all questions involving a conflict between the constitution of the United States and laws and treaties made in pursuance thereof, on the one side, and the constitutions and laws of the several States, on the other.

It is admitted, that the court has the right, in

* Amendments, Art. II.

all questions of a judicial character which may come before it, where the laws and treaties of the United States, and the constitution and laws of a State are in conflict or brought in question, to decide which is, or is not consistent with the constitution of the United States. But it is denied that this power is peculiar to it; or that its decision, in the last resort, is binding on any but the parties to it, and its co-departments. So far from being peculiar to it, the right appertains, not only to the Supreme Court of the United States, but to all the courts of the several States, superior and inferior; and even to foreign courts,—should a question be brought before them involving such conflict. It results, necessarily, from our system of government; where power is not only divided, but where constitutions and laws emanate from different authorities. Where this is the fact, it is the duty of the court to pronounce what is the law in the case before it;—and, of course,—where there is conflict between different laws,—to pronounce which is paramount. Now, as the constitution of the United States is, within its sphere, supreme over all others appertaining to the system, it necessarily results, that where any law conflicts with it, it is the duty of the court, before which the question arises, to pronounce the constitution to be paramount. If it be the Supreme Court of the United States, its decision,—being that of the highest judicial tribunal, in the last resort, of the parties to the case or controversy,—is, of course, final as it respects them,—but only as it respects them. It results, that its decision is not

binding as between the United States and the several States, as neither can make the other defendant in any controversy between them.

Others, who are forced by the strength of the argument to admit, that the judicial power does not extend to them, contend that Congress, the great organ of the government, has the right to decide, in the last resort, in all such controversies;—or in all questions involving the extent of their respective powers. They do not pretend to derive this high power from any specific provision of the constitution; they claim it to be a right incident to all governments, to decide as to the extent of its powers; and to enforce its decision by its own proper authority.

It is manifest, that they who contend for this right to its full extent, overlook the distinction, in this respect, between *single* governments, vested with all the powers appertaining to government, and *co-ordinate* governments, in a system where the powers of government are divided between two or more, as is the case with us. If it be admitted that the right belongs to both, and that co-ordinate governments, in this respect, stand on the same ground as single governments,—whatever right or power in such case, belongs to the one, must necessarily belong to the other: and, if so, the result must be, where they differ as to the extent of their respective powers, either a mutual negative on the acts of each other,—or the right of each to enforce its decision on the other. But it has already been established, that they have not the latter; and hence,

under any aspect in which the question can be viewed, the same conclusion follows,—that where the two governments differ as to the extent of their respective powers, a mutual negative is the consequence.

The effect of this is, to make each, as against the other, the guardian and protector of the powers allotted to it, and of which it is the organ and representative. By no other device, could the separate governments of the several States, as the weaker of the two, prevent the government of the United States, as the stronger, from encroaching on that portion of the reserved powers allotted to them, and finally absorbing the whole; except, indeed, by so organizing the former, as to give to each of the States a concurrent voice in making and administering the laws; and, of course, a veto on its action. The powers not delegated are expressly reserved to the respective States or the people; that is, to the governments of the respective States and the people thereof; and by them only can they be protected and preserved. The reason has been fully explained in the discourse on the elementary principles of government. But the several States, as weaker parties, can protect the portion not delegated, only in one of two ways; either by having a concurrent voice in the action of the government of the United States; or a negative on its acts, when they disagree as to the extent of their respective powers. One or the other is indispensable to the preservation of the reserved rights,—and to prevent the consolidation of all power in the government of the

United States, as the stronger. Why the latter was preferred by the convention which formed the constitution, may, probably, be attributed to the great number of States, and the belief that it was impossible so to organize the government, as to give to each a concurrent voice in its action, without rendering it too feeble and tardy to fulfil the ends for which it was intended. But, be this as it may, not having adopted it, no device remained, by which the reserved powers could be protected and preserved, but the one which they, in effect, did adopt, —by refusing to vest the government of the United States with a veto on the acts of the separate governments of the several States, in any form or manner whatever.

But it may be alleged, that the effect of a mutual negative on the part of the two co-ordinate governments, where they disagree as to the extent of their respective powers, will, while it guards against consolidation on one side,—lead to collision and conflict between them on the other;—and, finally, to disunion.

That the division of the powers of government between the two, without some means to prevent such result, would necessarily lead to collision and conflict, will not be denied. They are incident to every division of powers, of every description; whether it be that of co-ordinate departments, co-ordinate estates or classes, co-ordinate governments, or any other division of power appertaining to our system, or to that of any other constitutional government. It is impossible to construct one without

dividing the powers of government. But wherever, and however power may be divided, collision and conflict are necessary consequences, if not prevented. The more numerous and complex the divisions, the stronger the tendency to both, and the greater the necessity for powerful and effectual guards to prevent them. It is one of the evils incident to constitutional governments of every form. But we must take things as they are, with all their incidents, bad or good. The choice between constitutional and absolute governments, lies between the good and evil, incident to each. If the former be exposed to collision and conflict between its various parts, the latter is exposed to all the oppressions and abuses, ever incident to uncontrolled and irresponsible power, in all its forms. With us the choice lies between a national, consolidated and irresponsible government of a dominant portion, or section of the country,—and a federal, constitutional and responsible government, with all the divisions of powers indispensable to form and preserve such a government, in a country of such vast extent, and so great a diversity of interests and institutions as ours. The advantages of both, without the evils incident to either, we cannot have. Their nature and character are too opposite and hostile to be blended in the same system.

But while it is admitted that collision and conflict may be necessarily incident to a division of powers, it is utterly denied, that the effects of the mutual negative between the two co-ordinate governments would contribute to either, or necessarily

lead to disunion. On the contrary, its effects would be the very reverse. Instead of leading to either, it is an indispensable means to prevent the collision and conflict, which must necessarily arise between the delegated and reserved powers; and which, if not prevented, would, in the end, destroy the system, either by consolidation or dissolution. Its aim and end is to prevent the encroachment of either of the co-ordinate governments on the other. For this purpose it is the effectual, and the only effectual means that can be devised. By preventing such encroachments, it prevents collision and conflict between them. These are their natural offspring: collision follows encroachment,—and conflict, collision, in the order of events,—unless encroachment be acquiesced in. In that case, the weaker would be absorbed, and all power concentrated in the stronger.

But it may be alleged, that, in preventing these, it would lead to consequences not less to be dreaded;—that a negative on the part of the governments of so many States, where either might disagree with that of the United States, as to the extent of their respective powers, would lead to such embarrassment and confusion, and interpose so many impediments in its way, as to render it incompetent to fulfil the ends for which it was established. The objection is plausible; but it will be found, on investigation, that strong as the remedy is, it is not stronger than is required by the disease; and that the system furnishes ample means to correct whatever disorder it may occasion.

It may be laid down as a fundamental principle in constructing constitutional governments, that a strong government requires a negative proportionally strong, to restrict it to its appropriate sphere; and that, the stronger the government,—if the negative be proportionally strong, the better the government. It is only by making it proportionally strong, that an equilibrium can be established between the positive and negative powers—the power of acting, and the power of restricting action to its assigned limits. It is difficult to form a conception of a constitutional government stronger than that of the United States; and, consequently, of one requiring a stronger negative to keep it within its appropriate sphere. Combining, habitually, as it necessarily does, the united power and patronage of a majority of the States and of their population estimated in federal numbers, in opposition to a minority of each, with nothing but their separate and divided power and patronage, it is, to the full as strong, if not stronger, than was the goverment of Rome,—with its powerfully constituted Senate, including its control of the auspices, the censorship, and the dictatorship. It will, of course, require, in order to keep it within its proper bounds, a negative fully as strong in proportion, as the tribuneship; which, in its prime, consisted of ten members, elected by the plebeians, each of whom, (as has been supposed by some,—but a majority of whom, all admit,) had a negative, not only on the acts of the Senate, but on their execution. As powerful as was this negative, experiment proved that it was not too

strong for the positive power of the government. If the circumstances be considered, under which the negative of the several States will be brought into action, it will be found, on comparison, to be weaker in proportion, than the negative possessed by the tribuneship; and far more effectually guarded in its possible tendencies to disorder, or the derangement of the system.

In the first place, the negative of the tribunes extended to all the acts of the Senate, and to their execution; and,—as it was a single government without limitation on its authority,—to all the acts of government. On the other hand, the negative of the governments of the several States extends only to the *execution* of such acts of the government of the United States, as may present a question involving their respective powers; which, relatively, are very few, compared to the whole. In the next place, every tribune, or, at least, the majority of the college, possessed the power; and was ordinarily disposed to exercise it, as they all represented the portion of the Roman people, which their veto was intended to protect against oppression and abuse of power on the part of the Senate. On the contrary, the habitual relation between the governments of the several States and the government of the United States for the time, is such, as to identify the majority of them, in power and interest, with the latter; and to dispose them rather to enlarge and sustain its authority, than to resist its encroachments,—which, from their position, they regard as extending,—and not as contracting their powers. This limits the nega-

tive power of the governments of the several States to the minority, for the time: and even that minority will have, as experience proves, a minority in its own limits, almost always opposed to its will, and nearly of equal numbers with itself, identified in views and party feelings, with the majority in possession of the control of the government of the United States; and ever ready to counteract any opposition to its encroachments on the reserved powers. To this it may be added, that even the majority in this minority of the States, will, for the most part, be averse to making a stand against its encroachments; as they, themselves, hope, in their turn, to gain the ascendency; and are, therefore, naturally disinclined to weaken their party connections with the minority in the States possessing, for the time, the control of the government,—and whose interest and feelings, aside from party ties, would be with the majority of their respective States. Such being the case, it is apparent that there will be far less disposition on the part of the governments of the several States to resist the encroachments of the government of the United States on their reserved rights,—or to make an issue with it, when they disagree as to the extent of their respective powers,—than there was in the tribunate of the Roman republic to oppose acts, or the execution of acts, calculated to oppress, or deprive their order of its rights.

If to this it be further added, that the federal constitution provides,—not only that all the functionaries of the United States, but also those of the several States, including, expressly, the members of

their legislatures, and all their executive and judicial officers,—shall be bound, by oath or affirmation, to support the constitution;—and that the decision of the highest tribunal of the judicial power is final, as between the parties to a case or controversy,—the danger of any serious derangement or disorder from the effects of the negative on the parts of the separate governments of the several States, must appear, not only much less than that from the Roman tribunate, but very inconsiderable. The danger is, indeed, the other way;—that the disposition on the part of the governments of the several States, to acquiesce in the encroachments of the government of the United States, will prove stronger than the disposition to resist; and the negative, compared with the positive power, will be found to be too feeble to preserve the equilibrium between them. But if it should prove otherwise,—and if, in consequence, any serious derangement of the system should ensue, there will be found, in the earliest and highest division of power, which I shall next proceed to consider, ample and safe means of correcting them.

I refer to that resulting from, and inseparably connected with the primitive territorial division of the country itself,—coeval with its settlement into separate and distinct communities; and which, though dependent at the first on the parent country, became, by a successful resistance to its encroachments on their chartered rights, independent and sovereign States. In them severally,—or to express it more precisely, in the people composing them, regarded

as independent and sovereign communities, the ultimate power of the whole system resided, and from them the whole system emanated. Their first act was, to ordain and establish their respective separate constitutions and governments,—each by itself, and for itself,—without concert or agreement with the others; and their next, after the failure of the confederacy, was to ordain and establish the constitution and government of the United States, in the same way in every respect, as has been shown; except that it was done by concert and agreement with each other. That this high, this supreme power, has never been either delegated to, or vested in the separate governments of the States, or the federal government,—and that it is, therefore, one of the powers declared, by the 10th article of amendments, to be reserved to the people of the respective States; and that, of course, it still resides with them, will hardly be questioned. It must reside somewhere. No one will assert that it is extinguished. But, according to the fundamental principles of our system, sovereignty resides in the people, and not in the government; and if in them, it must be in them, as the people of the several States; for, politically speaking, there is no other known to the system. It not only resides in them, but resides in its plenitude, unexhausted and unimpaired. If proof be required, it will be found in the fact,—which cannot be controverted, so far as the United States are concerned,—that the people of the several States, acting in the same capacity and in the same way, in which they ordained and established the

federal constitution, can, by their concurrent and united voice, change or abolish it, and establish another in its place; or dissolve the Union, and resolve themselves into separate and disconnected States. A power which can rightfully do all this, must exist in full plenitude, unexhausted and unimpaired; for no higher act of sovereignty can be conceived.

But it does not follow from this, that the people of the several States, in ordaining and establishing the constitution of the United States, imposed no restriction on the exercise of sovereign power; for a sovereign may voluntarily impose restrictions on his acts, without, in any degree, exhausting or impairing his sovereignty; as is admitted by all writers on the subject. In the act of ordaining and establishing it, they have, accordingly, imposed several important restrictions on the exercise of their sovereign power. In order to ascertain what these are, and how far they extend, it will be necessary to ascertain, in what relation they stand to the constitution; and to each other in reference to it.

They stand then, as to the one, in the relation of superior to subordinate—the creator to the created. The people of the several States called it into existence, and conferred, by it, on the government, whatever power or authority it possesses. Regarded simply as a constitution, it is as subordinate to them, as are their respective State constitutions; and it imposes no more restrictions on the exercise of any of their sovereign rights, than they do. The case however is different as to the relations which the people of the several States bear to each other,

in reference to it. Having ratified and adopted it, by mutual agreement, they stand to it in the relation of parties to a constitutional compact; and, of course, it is binding between them as a *compact*, and not on, or over them, as a *constitution*. Of all compacts that can exist between independent and sovereign communities, it is the most intimate, solemn, and sacred,—whether regarded in reference to the closeness of connection, the importance of the objects to be effected, or to the obligations imposed. Laying aside all intermediate agencies, the people of the several States, in their sovereign capacity, agreed to unite themselves together, in the closest possible connection that could be formed, without merging their respective sovereignties into one common sovereignty,—to establish one common government, for certain specific objects, which, regarding the mutual interest and security of each, and of all, they supposed could be more certainly, safely, and effectually promoted by it, than by their several separate governments; pledging their faith, in the most solemn manner possible, to support the compact thus formed, by respecting its provisions, obeying all acts of the government made in conformity with them, and preserving it, as far as in them lay, against all infractions. But, as solemn and sacred as it is, and as high as the obligations may be which it imposes,—still it is but a *compact* and not a *constitution*,—*regarded in reference to the people of the several States, in their sovereign capacity.* To use the language of the constitution itself, it was ordained as a "constitution *for* the United States,"—

not *over* them; and established, not *over*, but "*between* the States ratifying it:" and hence, a State, acting in its sovereign capacity, and in the same manner in which it ratified and adopted the constitution, may be guilty of violating it *as a compact*, but cannot be guilty of violating it as a *law*. The case is the reverse, as to the action of its citizens, regarding them in their individual capacity. To them it is a law,—the supreme law within its sphere. They may be guilty of violating it *as a law*, or of violating the laws and treaties made in pursuance of, or under its authority, regarded as laws or treaties; but cannot be guilty of violating it as a *compact*. The constitution was ordained and established *over them* by their respective States, to whom they owed allegiance; and they are under the same obligation to respect and obey its authority, within its proper sphere, as they are to respect and obey their respective State constitutions; and for the same reason, viz.: that the State to which they owe allegiance, commanded it in both cases.

It follows, from what has been stated, that the people of the several States, regarded as parties to the constitutional compact, have imposed restrictions on the exercise of their sovereign power, by entering into a solemn obligation to do no act inconsistent with its provisions, and to uphold and support it within their respective limits. To this extent the restrictions go,—but no further. As parties to the constitutional compact, they retain the right, unrestricted, which appertains to such a relation in all cases where it is not surrendered, to

judge as to the extent of the obligation imposed by the agreement or compact,—in the first instance, where there is a higher authority; and, in the last resort, where there is none. The principle on which this assertion rests, is essential to the nature of contracts; and is in accord with universal practice. But the right to judge as to the extent of the obligation imposed, necessarily involves the right of pronouncing whether an act of the federal government, or any of its departments, be, or be not, in conformity to the provisions of the constitutional compact; and, if decided to be inconsistent, of pronouncing it to be unauthorized by the constitution, and, therefore, null, void, and of no effect. If the constitution be a compact, and the several States, regarded in their sovereign character, be parties to it, all the rest follow as necessary consequences. It would be puerile to suppose the right of judging existed, without the right of pronouncing whether an act of the government violated the provisions of the constitution or not; and equally so to suppose, that the right of judging existed, without the authority of declaring the consequence, to wit; that, as such, it is null, void, and of no effect. And hence, those who are unwilling to admit the consequences, have been found to deny that the constitution is a compact; in the face of facts as well established as any in our political history, and in utter disregard of that provision of the constitution, which expressly declares, that the ratification of nine States shall be sufficient to establish it "*between the States so ratifying the same.*"

But the right, with all these consequences, is not more certain than that possessed by the several States, as parties to the compact, of interposing for the purpose of arresting, within their respective limits, an act of the federal government in violation of the constitution; and thereby of preventing the delegated from encroaching on the reserved powers. Without such right, all the others would be barren and useless abstractions,—and just as puerile as the right of judging, without the right of pronouncing an act to be unconstitutional, and, as such, null and void. Nor is this right more certain, than that of the States, in the same character and capacity, to decide on the mode and measure to be adopted to arrest the act, and prevent the encroachment on the reserved powers. It is a right indispensable to all the others, and, without which, they would be valueless.

These conclusions follow irresistibly from incontestable facts and well established principles. But the possession of a right is one thing, and the exercise of it another. Rights, themselves, must be exercised with prudence and propriety: when otherwise exercised, they often cease to be rights, and become wrongs. The more important the right, and the more delicate its character, the higher the obligation to observe, strictly, the rules of prudence and propriety. But, of all the rights appertaining to the people of the several States, as members of a common Union, the one in question, is by far the most important and delicate; and, of course, requires, in its exercise, the greatest caution

and forbearance. As parties to the compact which constitutes the Union, they are under obligations to observe its provisions, and prevent their infraction. In exercising the right in question, they are bound to take special care that they do not themselves, violate this, the most sacred of obligations. To avoid this, prudence and propriety require that they should abstain from interposing their authority, to arrest an act of their common government, unless the case, in their opinion, involve a clear and palpable infraction of the instrument. They are bound to go further,—and to forbear from interposing, even when it is clear and palpable, unless it be, at the same time, highly dangerous in its character, and apparently admitting of no other remedy; and for the plain reason, that prudence and propriety require, that a right so high and delicate should be called into exercise, only in cases of great magnitude and extreme urgency. But even when, in the opinion of the people of a State, such a case has occurred;—that nothing, short of the interposition of their authority, can arrest the danger and preserve the constitution, they ought to interpose in good faith;—not to weaken or destroy the Union, but to uphold and preserve it, by causing the instrument on which it rests, to be observed and respected; and to this end, the mode and measure of redress ought to be exclusively directed and limited. In such a case, a State not only has the right, but is, in duty to itself and the Union, bound to interpose,—as the last resort, to arrest the dangerous infraction of the

constitution,—and to prevent the powers reserved to itself, from being absorbed by those delegated to the United States.

That the right, so exercised, would be, in itself, a safe and effectual security against so great an evil, few will doubt. But the question arises,—Will prudence and propriety be sufficient to prevent the wanton abuse of a right, so high and delicate, by the thirty parties to the compact,—and the many others hereafter to be added to the number?

I answer, no. Nor can any one, in the least acquainted with that constitution of our nature which makes governments necessary, give any other answer. The highest moral obligations,—truth, justice, and plighted faith,—much less, prudence and propriety,—oppose, of themselves, but feeble resistance to the abuse of power. But what they, of themselves, cannot effect, may be effected by other influences of a far less elevated character. Of these, many are powerful, and well calculated to prevent the abuse of this high and delicate right. Among them may be ranked, as most prominent and powerful, that which springs from the habitual action of a majority of the States and of their population, estimated in federal numbers, on the side of the federal government;—a majority naturally prone, and ever ready,—in all questions between it and a State, involving an infraction of the constitution, to throw its weight in the scale of the former. To this, may be added another, of no small force. I refer to that of party ties. Experience, as well as reason shows, that a government, operating as ours

does, must give rise to two great political parties,—which, although partaking, from the first, more or less of a sectional character, extend themselves, in unequal proportions, over the whole Union,—carrying with them, notwithstanding their sectional tendency, party sympathy and party attachment of such strength, that few are willing to break or weaken them, by resisting, even an acknowledged infraction of the constitution, of a nature alike oppressive and dangerous to their section. Both of these tend powerfully to resist the abuse of the right, by preventing it from being exercised imprudently and improperly. But I will not dwell on them, as they have been already considered in another connection. There are others, more especially connected with the subject at present before us, which I shall next consider.

The first may be traced to a fact, disclosed by experience, that, in most of the States, the preponderance of neither party is so decisive, that the minority may not hope to become the majority; and that, with this hope, it stands always ready to seize on any act of the majority, of doubtful propriety, as the means of turning it out of power and taking its place. Should the majority in any State, where the balance thus vibrates, venture to take a stand, and to interpose its authority, against the encroachment of the federal government on its reserved powers, it would be difficult to conceive a case, however clear and palpable the encroachment, or dangerous its character, in which the minority would not resist its action, and array itself on the side of the federal

government. And there are very few, in which, with the aid of its power and patronage, backed by the numerous presses in its support, the minority would not succeed in overcoming the majority,—taking their place, and, thereby, placing the State at the foot of the federal government. To this, another of great force may be added. The dominant party of the State, for the time, although it may be in a minority in the Union for the time, looks forward, of course, to the period when it will be in a majority of the Union; and have at its disposal all the honors and emoluments of the federal government. The leaders of such party, therefore, would not be insensible to the advantage, which their position, as such, would give them, to share largely in the distribution. This advantage they would not readily jeopard, by taking a stand which would render them, not only odious to the majority of the Union, at the time, but unpopular with their own party in the other States,—as putting in hazard their chance to become the majority. Under such circumstances, it would require, not only a clear and palpable case of infraction, and one of urgent necessity, but high virtue, patriotism and courage to exercise the right of interposition;—even if it were admitted to be clear and unquestionable. And hence, it is to be feared that, even this high right, combined with the mutual negative of the two co-ordinate governments, will be scarcely sufficient to counteract the vast and preponderating power of the federal government, and to prevent the absorption of the reserved by the delegated powers.

Indeed the negative power is always far weaker, in proportion to its appearance, than the positive. The latter having the control of the government, with all its honors and emoluments, has the means of acting on and influencing those who exercise the negative power, and of enlisting them on its side, unless it be effectually guarded: while, on the other hand, those who exercise the negative, have nothing but the simple power, and possess no means of influencing those who exercise the positive power.

But, suppose it should prove otherwise; and that the negative power should become so strong as to cause dangerous derangements and disorders in the system;—the constitution makes ample provisions for their correction,—whether produced by the interposition of a State, or the mutual negative, or conflict of power between the two co-ordinate governments. I refer to the amending power. Why it was necessary to provide for such a power; —what is its nature and character;—why it was modified as it is,—and whether it be safe, and sufficient to effect the objects intended,—are the questions, which I propose next to consider.

It is, as has already been explained, a fundamental principle, in forming such a federal community of States, and establishing such a federal constitution and government as ours, that no State could be bound but by its separate ratification and adoption. The principle is essentially connected with the independence and sovereignty of the several States. As the several States, in such a community, with such a constitution and government, still re-

tained their separate independence and sovereignty, it followed, that the compact into which they entered, could not be altered or changed, in any way, but by the unanimous assent of all the parties, without some express provision authorizing it. But there were strong objections to requiring the consent of all to make alterations or changes in the constitution. Those who formed it were not so vain as to suppose that they had made a perfect instrument; nor so ignorant as not to see, however perfect it might be, that derangements and disorders, resulting from time, circumstances, and the conflicting elements of the system itself, would make amendments necessary. But to leave it, without making some special provision for the purpose, would have been, in effect, to leave it to any one of the States to prevent amendments; which, in practice, would have been almost tantamount to leaving it without any power to amend;—notwithstanding its necessity. And, hence, the subject of making some special provision for amending the constitution, was forced on the attention of the convention.

There was diversity of opinion as to what the nature and character of the amending power should be. All agreed that it should be a modification of the original creative power, which ordained and established the separate constitutions and governments of the several States; and, by which alone, the proposed constitution and government could be ordained and established: or, to express it differently and more explicitly,—that amendments should be the acts of the several States, voting as States,—

each counting one,—and not the act of the government. But there was great diversity of opinion as to what *number* of States should be required to concur, or agree, in order to make an amendment. It was first moved to require the consent of all the States. This was followed by a motion to amend, requiring *two thirds;* which was overruled by a considerable majority. It was then moved to require the concurrence of *three fourths*, which was agreed to, and finally adopted without dissent.

To understand fully the reasons for so modifying the original creative power, as to require the concurrence of three fourths to make an amendment, it will be necessary to advert to another portion of the proceedings of the convention, intimately connected with the present question. I refer to that which contains a history of its action in regard to the number of States required to ratify the constitution, before it should become binding between those so ratifying it. It is material to state, that although the article in respect to ratifications, which grew out of these proceedings, stands last in the constitution, it was finally agreed on and adopted before the article in regard to amendments;—and had, doubtless, no inconsiderable influence in determining the number of States required for that purpose.

There was, in reference to both, great diversity of opinion as to the requisite number of States. With the exception of one State, all agreed that entire unanimity should not be required; but the majority divided as to the number which should be

required. One of the most prominent leaders of the party, originally in favor of a national government, was in favor of requiring only a bare majority of the States. Another, not less distinguished, was in favor of the same proposition; but so modified as to require such majority to contain, also, a majority of the entire population of all the States; and, in default of this, as many additional States as would be necessary to supply the deficiency. On the other hand, the more prominent members of the party in favor of a federal government, inclined to a larger number. One of the most influential of these, moved to require ten States; on which motion the convention was nearly equally divided. Finally, the number nine was agreed on;—constituting *three fourths* of all the States represented in the convention,—and, as nearly as might be, of all the States at that time in the Union.

Why the first propositions were rejected, and the last finally agreed on, requires explanation. The first proposition, requiring the ratification of all the States, before the constitution should become binding between those so ratifying the same, was rejected, doubtless, because it was deemed unreasonable that the fate of the others should be made dependent on the will of a single State. The convention acted under the pressure of very trying exigencies. The confederacy had failed; and it was absolutely necessary that something should be done to save the credit of the Union, and to guard against confusion and anarchy. The plan of the constitution and government adopted, was the only one that could be agreed

on; and the fate of the country apparently rested on its ratification by the States. In such a state of things, it seemed to be too hazardous to put it in the power of a single State to defeat it. Nothing short of so great a pressure could justify an act which made so great a change in the articles of confederation;—which expressly provided that no alteration should be made in any of them, "unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."

The rejection of the other proposition, which required a mere majority of the States to make it binding as between the States so ratifying it, will scarcely require explanation. It exposed the States to the hazard of forming, not one, but two Unions; or, if this should be avoided,—by forcing the other States to come in reluctantly, under the force of circumstances, it endangered the harmony and duration of the Union, and the proposed constitution and government. It would, besides, have evinced too great an indifference to the stipulation contained in the articles of the confederation just cited.

It remains now to be explained why the particular number, between these two extremes, was finally agreed on. Among other reasons, one, doubtless, is to be found in the fact, that the articles of the then existing confederation, required the consent of nine States to give validity to many of the acts of their Congress;—among which, were the acts declaring war,—granting letters of marque and reprisal in time of peace, and emitting bills, or borrowing money on

the credit of the United States. The object of requiring so great a number was, to guard against the abuses of these and the other great and delicate powers contained in the provision. A mere majority of the States, was too few to be intrusted with such powers; and, to make the trust more safe, the consent of nine States was required; which was within a small fraction of *three fourths* of the whole number at the time. The precedent,—and the same consideration which induced the legislatures of all the States to assent to it, in adopting the articles of confederation, must have had, undoubtedly, much weight in determining what number of States should ratify the constitution, before it should become binding between them. If the legislatures of all the States should have unanimously deemed it not unreasonable, that the highest and most delicate acts of the old Congress, when agreed to by nine or more States, should be acquiesced in by the others, it was very natural that the members of the convention should think it not unreasonable to require an equal number to give validity to the constitution, as between them;—leaving it to the others to say whether they would ratify or not. Nine, or *three fourths* of the whole, were, unquestionably, regarded as a safe and sufficient guaranty against oppression and abuse, both in the highest acts of the confederacy, and in establishing the constitution between the States ratifying it. And it is equally certain that a smaller number was not regarded either as safe, or sufficient.

The force of these precedents, combined with

the reasons for adopting them, must have had great weight in determining the proportional number which should be required to amend the constitution. Indeed, after determining the proportion in the provision for the ratification of the constitution, it would seem to follow, as a matter of course, that the same proportion should be required in the provision for amending it. It would be difficult to assign a reason, why the proportion should be different in the two cases; and why, if *three fourths* should be required in the one, it should not also be required in the other. If it would have been unreasonable and improper in the one, that a few States in proportion should, by their obstinacy, prevent the others from forming a constitution,—it would have been equally so, and for the same reason, that the like proportion should have the power to prevent amendments, however necessary they might be to the well working and safety of the system. So, again, if it would have been dangerous and improper, to permit a bare majority of the States, or any proportion less than that required to make the constitution binding as between the States ratifying,—it would have been no less so to permit such number or proportion to amend it. The two are, indeed, nearly allied, and involve, throughout, the same principle;—and hence, the same diversity of opinion between the two parties in the convention, in reference to both, and the adoption of the same proportion of States in each. I say the same proportion,—for although nine States were rather less than *three fourths* of the

whole number when the constitution was ratified,—this proportion of the States was required in order to amend it, (without regard to an inconsiderable fraction,) because of the facility of its application.

But independently of these considerations, there were strong reasons for adopting that proportion in providing a power to amend. It was, at least, as necessary to guard against too much facility as too much difficulty, in amending it. If, to require the consent of all the States for that purpose would be, in effect, to prevent amendments which time should disclose to be,—or change of circumstances make necessary;—so, on the other hand, to require a bare majority only, or but a small number in proportion to the whole, would expose the constitution to hasty, inconsiderate, and even sinister amendments, on the part of the party dominant for the time. If the one would give it too much fixedness, the other would deprive it of all stability. Of the two, the latter would be more dangerous than the former. It would defeat the very ends of a constitution, regarded as a fundamental law. Indeed, it would involve a glaring absurdity to require the separate ratification of nine States to make the constitution binding as between them,—and to provide that a mere majority of States, or even a small one, when compared with the whole number, should have the power, as soon as it went into operation, to amend it as they pleased. It would be difficult to find any other proportion better calculated to avoid this absurdity, and, at the same time, the difficulties attending the other extreme, than that

adopted by the convention. While it affords sufficient facility, it guards against too much, in amending the constitution,—and thereby unites stability with the capacity of adjusting itself to all such changes as may become necessary; and thus combines all the requisites that are necessary in the amending power. It hardly admits of a doubt, that these combined reasons,—the conviction that it possessed all the requisites for such a power, in a higher degree than any other proportion,—with the force of the two precedents above explained, induced the convention to adopt it.

Possessing these, it possesses all the requisites, of course, to render the power at once safe in itself, and sufficient to effect the objects for which it was intended. It is safe; because the proportion is sufficiently large to prevent a dominant portion of the Union, or combination of the States, from using the amending power as an instrument to make changes in the constitution, adverse to the interests and rights of the weaker portion of the Union, or a minority of the States. It may not, in this respect, be as perfectly safe as it would be in the unmodified state in which it ordained and established the constitution; but, for all practical purposes, it is believed to be safe as an *amending* power. It is difficult to conceive a case, where so large a portion as *three fourths* of the States would undertake to insert a power, by way of amendment, which, instead of improving and perfecting the constitution, would deprive the remaining *fourth* of any right, essentially belonging to them as members of the

Union, or clearly intended to oppress them. There are many powers, which a dominant combination of States would assume by *construction*, and use for the purpose of aggrandizement, which they would not dare to propose to insert as amendments. But should an attempt be successfully made to engraft an amendment for such a purpose, the case would not be without remedy, as will be shown in the proper place.

I say, as large a proportion as *three fourths*;—for the larger the proportion required to do an act, the less is the danger of the power being used for the purpose of oppression and aggrandizement. The reason is plain. With the increase of the proportion, the difficulty of so using it, is increased;—while the inducement is diminished in the same proportion. The former is increased;—because the difficulty of forming combinations for such purpose is increased with the increase of the number required to combine; and the latter decreased, because the greater the number to be aggrandized, and the less the number, by whose oppression this can be effected, the less the inducement to oppression. And hence, by increasing the proportion, the number to be aggrandized may be made so large, and the number to be oppressed so small, as to make the effort bootless;—when the motive to oppress, as well as to abuse power will, of course, cease.

But, while *three fourths* furnish a safe proportion against making changes in the constitution, under the color of amendments, by the dominant portion of the Union, with a view to oppress the

weaker for its aggrandizement, the proportion is equally safe, in view of the opposite danger;—as it furnishes a sufficient protection against the combination of a few States to prevent the rest from making such amendments as may become necessary to preserve or perfect it. It thus guards against the dangers, to which a less, or greater proportion might expose the system.

It is not less sufficient than safe to effect the object intended. As a modification of the power which ordained and established the system, its authority is above all others, except itself in its simple and absolute form. Within its appropriate sphere,—that of *amending* the constitution,—all others are subject to its control, and may be modified, changed and altered at its pleasure. Within that sphere it truly represents the intention of the power, of which it is a modification, when it ordained and established the constitution,—as to the limits to which the system might be safely and properly extended, and beyond which it could not. The same wisdom, which saw the necessity of having as much harmony as possible, in ratifying the constitution, saw, also, the necessity of preserving it, after it went into operation; and therefore required the same proportion of States to make an amendment, as to ratify the instrument, before it could become binding between the States ratifying. It saw, that, if there was danger from *too little*, there was also danger from *too much* union (if I may be allowed so to express myself);—and that, while one led to weakness, the other led to discord and alienation.

To guard against each, it so modified the amending power as to avoid both extremes,—and thus to preserve the equilibrium of the powers of the system as originally established, so far as human contrivance could.

Thus the power which, in its simple and absolute form, was the creator, becomes, in its modified form, the preserver of the system. By no other device, nor in any other form, could the high functions appertaining to this character, be safely and efficiently discharged;—and by none other could the system be preserved. It is, when properly understood, the *vis medicatrix* of the system;—its great repairing, healing, and conservative power;—intended to remedy its disorders, in whatever cause or causes originating; whether in the original errors or defects of the constitution itself,—or the operation of time and change of circumstances, or in conflicts between its parts,—including those between the co-ordinate governments. By it alone, can the equilibrium of the various powers and divisions of the system be preserved; as by it alone, can the stronger be prevented from encroaching on, and finally absorbing the weaker. For this purpose, it is, as has been shown, entirely safe and all-sufficient. In performing its high functions, it acts, not as a judicial power, but in the far more elevated and authoritative character of an *amending* power;—the only one in which it can be called into action at all. In this character, it can amend the constitution, by modifying its existing provisions;—or, in case of a disputed power, whether it be between the federal govern-

ment and one of its co-ordinates,—or between the former and an interposing State,—by declaring, authoritatively, what is the constitution.

Having now explained the nature and object of the amending power, and shown its safety and sufficiency, in respect to the object for which it was provided;—I shall next proceed to show, that it is the duty of the federal government to invoke its aid, should any dangerous derangement or disorder result from the mutual negative of the two co-ordinate governments, or from the interposition of a State, in its sovereign character, to arrest one of its acts,—in case all other remedies should fail to adjust the difficulty.

In order to form a clear conception of the true ground and reason of this duty, it is necessary to premise, that it is difficult to conceive of a case, where a conflict of power could take place between the government of a State, or the State itself in its sovereign character, and the federal government, in which the former would not be in a minority of the States and of their population, estimated in federal numbers; and, of course, the latter in a majority of both. The reason is obvious. If it were otherwise, the remedy would at once be applied through the federal government,—by a repeal of the act asserting the power,—and the question settled by yielding it to the State. Such being the case, the conflict, whenever it takes place, must be between the reserved and delegated powers; the latter, supported by a majority both of the States and of their population, claiming the right to exer-

cise the power,—and the former, by a State constituting one of the minority,—(at least as far as it relates to the power in controversy,)—denying the claim.

Now it is a clear and well established principle, that the party who claims the right to exercise a power, is bound to make it good, against the party denying the right; and that, if there should be an authority higher than either provided, by which the question between them can be adjusted, he, in such case, has no right to assert his claim on his own authority,—but is bound to appeal to the tribunal appointed, according to the forms prescribed, and to establish and assert his right through its authority.

If a principle, so clear and well established, should, in a case like the one supposed, require confirmation,—it may be found in the fact, that the powers of the federal government are all enumerated and specified in the constitution;—while those belonging to the States embrace the whole residuary mass of powers, not enumerated and specified. Hence, in a conflict of power between the two, the presumption is in favor of the latter, and against the former; and, therefore, it is doubly bound to establish the power in controversy, through the appointed authority, before it can rightfully undertake to exercise it.

But as conclusive as these reasons are, there are others not less so. Among these, it may be stated, that the federal government, being of the party of the majority in such conflicts, may, at pleasure, make the appeal to the amending power; while the State,

being of the party of the minority, cannot possibly do so. The reason is plain. To make it, requires, on the part of the State, more than a bare majority. It would then be absurd, to transfer the duty from the party of the majority, which has the power, to that of the minority, which has it not:—and this, too, when, with such a majority, the question of power could be settled in its favor, more easily and promptly, through the federal government itself.

There is also another reason,—if not more conclusive, yet of deeper import. The federal government never will make an appeal to the amending power, in a case of conflict, unless compelled;—nor, indeed, willingly in any case, except with a view to enlarge the powers it has usurped by construction. The only means, by which it can be compelled to make an appeal, are the negative powers of the constitution;—and especially, so far as the reserved powers are concerned,—by that of its co-ordinates,—and State interposition. But to transfer the duty from itself to the States, would, necessarily, have the effect, so far as they are concerned, of leaving it in the full and quiet exercise of the contested power, until the appeal was made and finally acted on;—instead of suspending the exercise of the power, until the decision was pronounced;—as would be the case, if the duty were not transferred. In the latter case, it would have every motive to exert itself to make the appeal, and to obtain a speedy and final action in its favor, if possible; but in the former, it would be the reverse. The motive would be to use every effort to prevent a successful appeal,

and to defeat action on it; as, in the mean time, it would be left in full possession of the power in question. Nor would it have any difficulty in effecting what it desired; as it would be impossible for the State, even without opposition, to succeed in making an appeal, for the reason already assigned.

Its effect would be a revolution in the character of the system. It would virtually destroy the relation of co-ordinates between the federal government and those of the several States, by rendering the negative of the latter, in case of conflict with it, of no effect. It would supersede and render substantially obsolete, not only the amending power, but the original sovereign power of the several States, as parties to the constitutional compact,—by making them, also, of no effect; and, thereby, elevate the federal government to the absolute and supreme authority of the system, with liberty to assume, by construction, whatever power the cupidity or ambition of a dominant party or section might crave.

It would, in a word, practically transform the federal, into a consolidated national government, against the avowed intention of its framers,—the plain meaning of the constitution itself,—and the understanding of the people of the States, when they ratified and adopted it. Such a result is, itself, the strongest, the most conclusive argument against the position. If there were none other, this, of itself, would be ample to prove, that it is the duty of the federal government to invoke the action of the amending power, by proposing a declaratory

amendment affirming the power it claims, according to the forms prescribed in the constitution; and, if it fail, to abandon the power.

On the other hand, should it succeed in obtaining the amendment, the act of the government of the separate State which caused the conflict, and operated as a negative on the act of the federal government, would, in all cases, be overruled; and the latter become operative within its limits. But the result is, in some respects, different,—where a State, acting in her sovereign character, and as a party to the constitutional compact, has interposed, and declared an act of the federal government to be unauthorized by the constitution,—and, therefore, null and void. In this case, if the act of the latter be predicated on a power consistent with the character of the constitution, the ends for which it was established, and the nature of our system of government; —or, more briefly, if it come fairly within the scope of the amending power, the State is bound to acquiesce, by the solemn obligation which it contracted, in ratifying the constitution. But if it transcends the limits of the amending power,—be inconsistent with the character of the constitution and the ends for which it was established,—or with the nature of the system,—the result is different. In such case, the State is not bound to acquiesce. It may choose whether it will, or whether it will not secede from the Union. One or the other course it must take. To refuse acquiescence, would be tantamount to secession; and place it as entirely in the relation of a foreign State to the other States, as would a posi-

tive act of secession. That a State, as a party to the constitutional compact, has the right to secede, —acting in the same capacity in which it ratified the constitution,—cannot, with any show of reason, be denied by any one who regards the constitution as a compact,—if a power should be inserted by the amending power, which would radically change the character of the constitution, or the nature of the system; or if the former should fail to fulfil the ends for which it was established. This results, necessarily, from the nature of a compact,—where the parties to it are sovereign; and, of course, have no higher authority to which to appeal. That the effect of secession would be to place her in the relation of a foreign State to the others, is equally clear. Nor is it less so, that it would make her, (not her citizens *individually*,) responsible to them, in that character. All this results, necessarily, from the nature of a compact between sovereign parties.

In case the State acquiesces, whether it be where the power claimed is within or beyond the scope of the amending power, it must be done, by rescinding the act, by which, she interposed her authority and declared the act of the federal government to be unauthorized by the constitution,—and, therefore, null and void; and this too by the same authority which passed it. The reason is, that, until this is done, the act making the declaration continues binding on her citizens. As far as they are concerned, the State, as a party to the constitutional compact, has the right to decide, in the last resort,—and, acting in the same character in which it ratified the

constitution, to determine to what limits its powers extend, and how far they are bound to respect and obey it, and the acts made under its authority. They are bound to obey them, only, because the State, to which they owe allegiance, by ratifying, ordained and established it as its own constitution and government; just in the same way, in which it ordained and established its own separate constitution and government,—and by precisely the same authority. They owe *obedience* to both; because their State commanded them to obey; but they owe *allegiance* to neither; since sovereignty, by a fundamental principle of our system, resides in the *people*, and not in the *government*. The same authority which commanded *obedience*, has the right, in both cases, to determine, as far as they are concerned, the extent to which they were bound to obey; and this determination remains binding until rescinded by the authority which pronounced and declared it.

I have now finished the discussion of the question,—What means does the constitution, or the system itself furnish, to preserve the division between the delegated and reserved powers? In its progress, I have shown, that the federal government contains, within itself, or in its organization, no provisions, by which, the powers delegated could be prevented from encroaching on the powers reserved to the several States; and that, the only means furnished by the system itself, to resist encroachments, are, the mutual negative between the two co-ordinate governments, where their acts come into conflict as to the extent of their respective powers; and the

interposition of a State in its sovereign character, as a party to the constitutional compact, against an unconstitutional act of the federal government. It has also been shown, that these are sufficient to restrict the action of the federal government to its appropriate sphere; and that, if they should lead to any dangerous derangements or disorders, the amending power makes ample and safe provision for their correction. It now remains to be considered, what must be the result, if the federal government is left to operate without these exterior means of restraint.

That the federal government, as the representative of the delegated powers, supported, as it must habitually be, by a majority of the States and of their population, estimated in federal numbers, is vastly stronger than the opposing States and their population, has been shown. But the fact of its greater strength is not more certain than the consequence,—that it will encroach, if left to decide in the last resort, on the extent of its own powers, and to enforce its own decisions, without some adequate means to restrict it to its allotted sphere. It would encroach; because the dominant combination of States and population, which, for the time, may control it, would have every inducement to do so; since it would increase their power and the means of aggrandizement. Nor would their encroachments cease until all the reserved powers,—those reserved to the people of the several States in their sovereign character, as well as those delegated to their respective separate governments, should be absorbed: because,

the same powerful motives which induced the first step towards it, would continue, until the whole was concentrated in the federal government. The written restrictions and limitations of the constitution, would oppose no effectual resistance. They would all be gradually undermined by the slow and certain process of construction; which would be continued until the instrument itself, would be of no more force or validity than an ordinary act of Congress;—nor would it be more respected. The opposing construction of the minority would become the subject of ridicule and scorn,—as mere abstractions;—until all encroachments would cease to be opposed. Nor would the effects end with the absorption of the reserved powers.

While the process was going on, it would react on the division of the powers of the federal government itself, and disturb its own equilibrium. The legislative department would be the first to feel its influence, and to cumulate authority, by encroachments; since Congress, as the organ of the delegated powers, possesses, by an express provision of the constitution, all the discretionary powers of the government. Neither of the other two can constitutionally exercise any power, which is not either expressly delegated by the constitution, or provided for by law. So long, then, as Congress remained faithful to its trust, neither of the others could encroach; since the officers of both are responsible to it, through the impeaching power; and hence the work of aggression must commence with it, or by its permission. But whatever encroachments it

might make, the benefit, in the end, would accrue, not to itself, but to the President,—as the head of the executive department. Every enlargement of the powers of the government which may be made, every measure which may be adopted to aggrandize the dominant combination which may control the government for the time, must necessarily enlarge, in a greater or less degree, his patronage and influence. With their enlargement, his power to control the other departments of the government, and the organs of public opinion, and through them, the community at large, must increase, and in the same degree. With their increase, the motive to obtain possession of the control of the government, in order to enjoy its honors and emoluments, regardless of all considerations of principle or policy, would become stronger and stronger, until it would stand alone, the paramount and all-absorbing motive. And,—to trace further the fatal progress,—just in proportion as this motive should become stronger, the election of the President would be, more and more, the all-important question,—until every other would be regarded as subordinate to it. But as this became more and more paramount to all others, party combinations, and party organization and discipline, would become more concentrated and stringent;—their control over individual opinion and action more and more decisive; and, with it, the control of the President, as the head of the dominant party. When this should be increased to such a degree, that he, as its head, could, through party organs and party machinery, wield sufficient influence

over the constituents of the members of Congress, belonging to his party, as to make their election dependent, not on their fidelity to the constitution or to the country, but on their devotion and submission to party and party interest,—his power would become absolute. They then would cease, virtually, to represent the people. Their responsibility would be, not to them, but to him; or to those who might control and use him as an instrument. The Executive, at this stage, would become absolute, so far as the party in power was concerned. It would control the action of the dominant party as effectually as would an hereditary chief-magistrate, if in possession of its powers,—if not more so; and the time would not be distant, when the President would cease to be elective; when a contested election, or the paid corruption and violence attending an election, would be made a pretext, by the occupant, or his party, for holding over after the expiration of his term.

Such must be the result, if the process of absorption should be permitted to progress regularly, through all its stages. The causes which would control the event, are as fixed and certain as any in the physical world. But it is not probable that they would be permitted to take their regular course, undisturbed. In a country of such vast extent and diversity of interests as ours, parties, in all their stages, must partake, as I have already shown, more or less of a sectional character. The laws which control their formation, necessarily lead to this. Distance, as has been stated, always weakens, and prox-

imity—where there is no counteracting cause—always strengthens the social and sympathetic feelings. Sameness of interests and similarity of habits and character, make it more easy for those who are contiguous, to associate together and form a party than for those who are remote. In the early stages of the government, when principles bore a stronger sway, the effects of these causes were not so perceptible, or their influence so great. But as party violence increases, and party efforts sink down into a mere struggle to obtain the honors and emoluments of government, the tendency to appeal to local feelings, local interests, and local prejudices will become stronger and stronger,—until, ultimately, parties must assume a decidedly sectional character. When it comes to this,—and when the two majorities which control the federal government, come to centre in the same section, and all the powers of the entire system, virtually to unite in the executive department, the dominant section will become the governing, and the other the subordinate section; as much so as if it were a dependent province, without any real participation in the government. Its condition will be even worse; for its nominal participation in the acts of government would afford it no means of protecting itself, where the interests of the dominant and governing section should come into conflict with its own,—whilst it would serve as a covering to disguise its subjection, and, thereby, induce it to bear wrongs, which it would not otherwise tolerate. In this state of things, discontent, alienation, and hostility of feelings would be engen-

dered between the sections; to be followed by discord, disorder, convulsions, and, not improbably, a disruption of the system.

In one or the other of these results, it must terminate, if the federal government be left to decide, definitively and in the last resort, as to the extent of its powers. Having no sufficient counteraction, exterior to itself, it must necessarily move in the direction marked out by the inherent tendency belonging to its character and position. As a constitutional, popular government, its tendency will be, in the first place, to an absolute form, under the control of the numerical majority; and, finally, to the most simple of these forms, that of a single, irresponsible individual. As a federal government, extending over a vast territory, the tendency will be, in the first place, to the formation of sectional parties, and the concentration of all power in the stronger section; and, in the next, to conflict between the sections, and disrupture of the whole system. One or the other must be the end, in the case supposed. The laws that would govern are fixed and certain. The only question would be, as to *which end*, and at *what time*. All the rest is as certain as the future, if not disturbed by causes exterior to the system.

So strong indeed is the tendency of the government in the direction assigned,—if left to itself,—that nothing short of the most powerful negatives, exterior to itself, can effectually counteract and arrest it. These, from the nature of the system, can only be found in the mutual negative of the two co-ordinate governments, and the interposition of a

State, as has been explained;—the one to protect the powers which the people of the several States delegated to their respective separate State governments;—and the other, to protect the powers which the people of the several States, in delegating powers to both of their co-ordinate governments, expressly reserved to themselves respectively. The object of the negative power is, to protect the several portions or interests of the community against each other. Ours is a federal community, of which States form the constituent parts. They reserved the powers not delegated to the federal or common government to themselves individually;—but in a twofold character, as embracing separate governments, and as a several people in their sovereign capacity. But where the powers of government are divided, nothing short of a negative,—either positive, or in effect,—can protect those alotted to the weaker, against the stronger;—or the parts of the community against each other. The party to whom the power belongs, is the only party interested in protecting it; and to such party only, can its defence be safely trusted. To intrust it, in this case, to the party interested in absorbing it, and possessed of ample power to do so, is, as has been shown, to trust the lamb to the custody of the wolf.

Nor can any other, so appropriate, so safe or efficient, be devised, as the twofold negative provided by the system. They are appropriate to the twofold character of the State, to which, the powers not delegated, are reserved. That they are safe

and sufficient, if called into action, has been shown. All other provisions, without them, would be of little avail:—such as the right of suffrage,—written constitutions,—the division of the powers of the government into three separate and independent departments,—the formation of the people into individual and independent States, and the freedom of the press and of speech. These all have their value. They may retard the progress of the government towards its final termination,—but without the two negative powers, cannot arrest it;—nor can any thing, short of these, preserve the equilibrium of the system. Without them, every other power would be gradually absorbed by the federal government, or be superseded or rendered obsolete. It would remain the only vital power, and the sole organ of a consolidated community.

If we turn now from this to the other aspect of the subject, where these negative powers are brought into full action in order to counteract the tendency of the federal government to supersede and absorb the powers of the system, the contrast will be striking. Instead of weakening the government by counteracting its tendencies, and restricting it to its proper sphere, they would render it far more powerful. A strong government, instead of being weakened, is greatly strengthened, by a correspondingly strong negative. It may lose something in promptitude of action, in calling out the physical force of the country, but would gain vastly in moral power. The security it would afford to all the different parts and interests of the country,

—the assurance that the powers confided to it, would not be abused,—and the harmony and unanimity resulting from the conviction that no one section or interest could oppress another, would, in an emergency, put the whole resources of the Union, moral and physical, at the disposal of the government,—and give it a strength which never could be acquired by the enlargement of its powers beyond the limits assigned to it. It is, indeed, only by such confidence and unanimity, that a government can, with certainty, breast the billows and ride through the storms which the vessel of State must often encounter in its progress. The stronger the pressure of the steam, if the boiler be but proportionally strong, the more securely the bark buffets the wave, and defies the tempest.

Nor is there any just ground to apprehend that the federal government would lose any power which properly belongs to it, or which it should desire to retain, by being compelled to resort to the amending power, when this becomes necessary in consequence of a conflict between itself and one of its co-ordinates; or, in case of the interposition of a State. There can certainly be no danger of this, so long as the same feelings and motives which induced them voluntarily to ratify and adopt the constitution unanimously, shall continue to actuate them. While these remain, there can be no hazard in placing what all freely and unanimously adopted, in the charge of three fourths of the States to protect and preserve. Nor can there be any just ground to apprehend that these feelings and motives

will undergo any change, so long as the constitution shall fulfil the ends for which it was ordained and established; to wit: that each and all might enjoy, more perfectly and securely, liberty, peace, tranquillity, security from danger, both internal and external, and all other blessings connected with their respective rights and advantages. It was a great mistake to suppose that the States would naturally stand in antagonistic relations to the federal government; or that there would be any disposition, on their part, to diminish its power or to weaken its influence. They naturally stand in a reverse relation,—pledged to cherish, uphold, and support it. They freely and voluntarily created it, for the common good of each and of all,—and will cherish and defend it so long as it fulfils these objects. If its safe-keeping cannot be intrusted to its creators, it can be safely placed in the custody of no other hands.

But it cannot be confined to its proper sphere, and its various powers kept in a state of equilibrium, as originally established, but by the counteracting resistance of the States, acting in their twofold character, as has been explained and established. Nor can it fulfil its end without confining it to its proper sphere, and preserving the equilibrium of its various powers. Without this, the federal government would concentrate all the powers of the system in itself, and become an instrument in the hands of the dominant portion of the States, to aggrandize itself at the expense of the rest;—as has also been fully explained and estab-

lished. With the defeat of the ends for which it was established, the feelings and motives which induced the States to establish it, would gradually change; and, finally, give place to others of a very different character. The weaker and oppressed portion would regard it with distrust, jealousy, and, in the end, aversion and hostility; while the stronger and more favored, would look upon it, not as the means of promoting the common good and safety of each and all, but as an instrument to control the weaker, and to aggrandize itself at its expense.

As nothing but the counteracting resistance of the States can prevent this result, so nothing short of a full recognition of this, the only means, by which they can make such resistance, and call it freely into action,—can correct the disorders, and avert the dangers which must ensue from an opposite and false conception of the system; and thus restore the feelings and motives which led to the free and unanimous adoption of the federal constitution and government. With their restoration, the amending power may be safely trusted, as the preserving, repairing, and protecting power. There would be no danger whatever, that the government, under its action, would lose any power which properly belonged to it, and which it ought to retain; for there would be no motive or interest, on any side, to divest it of any power necessary to enable it to fulfil the ends for which it was established; or to impair, unduly, the strength of the Union. Indeed, it is so modified as to afford an ample guaranty

that the Union would be safe in its custody;—since it was designedly so constructed as to represent, at all times, the extent to which it might be safely carried, and beyond which it ought not to go. It may, indeed, in case of conflict between it and one of its co-ordinate governments, or an interposing state, modify and restrict the power in contest, in strict conformity with the design and the spirit of the constitution. For it may be laid down as a principle, that the power and action of the Union, instead of being increased, ought to be diminished, with the increase of its extent and population. The reason is, that the greater its extent, and the more numerous and populous the members composing it, the greater will be the diversity of interests, the less the sympathy between the remote parts, the less the knowledge and regard of each, for the interests of the others, and, of course, the less *closeness of union*, (so to speak,) consistently with its safety. The same principle, according to which it was provided that there should not be more closeness of union than three fourths should agree to, equally applies in all stages of the growth and progress of the country; to wit: that there should not be, at any time, more than the same proportion would agree to. It ought ever to be borne in mind that the Union may have too much power, and be too intimate and close; as well as too little power, intimacy, and closeness. Either is dangerous. If the latter, from weakness, exposes it to dissolution, the former, from exuberance of strength, and from the parts being too closely compressed together, exposes

it, at least equally, either to consolidation and despotism, on the one hand,—or to rupture and destruction, by the repulsion of its parts, on the other. The amending power, if duly called into action, would protect the Union against either extreme; and thereby guard against the dangers to which it is on either hand exposed.

It is by thus bringing all the powers of the system into active operation,—and only by this means, that its equilibrium can be preserved, and adjusted to the changes, which the enlargement of the Union, and its increase of population, or other causes, may require. Thus only, can the Union be preserved; the government made permanent; the limits of the country be enlarged; the anticipations of the founders of the system, as to its future prosperity and greatness,—be realized; and the revolutions and calamities, necessarily incident to the theory which would make the federal government the sole and exclusive judge of its powers, be averted.

I have now finished the portion of this discourse which relates to the character and structure of the government of the United States;—its various divisions of power, as well as those of the system of which it is a part,—and the means which they furnish to protect each division against the encroachment of the others. The government has now been in operation for more than sixty years; and it remains to be considered, whether it has conformed, in practice, with its true theory; and, if not, what has caused its departure; and what must be the consequence, should its aberrations remain un-

corrected. I propose to consider these in the order stated.

There are few who will not admit, that the government has, in practice, departed, more or less, from its original character and structure;—however great may be the diversity of opinion, as to what constitutes a departure;—a diversity caused by the different views entertained in reference to its character and structure. They who believe that the government of the United States is a national, and not a federal government,—or who believe that it is partly national and partly federal,—will, of course, on the question,—whether it has conformed to, or departed from its true theory,—form very different opinions from those who believe that it is federal throughout. They who believe that it is exclusively national, very logically conclude, according to their theory, that the government has the exclusive right, in the last resort, to decide as to the extent of its powers, and to enforce its decisions against all opposition, through some one or all of its departments:—while they who believe it to be exclusively federal, cannot consistently come to any other conclusion, than that the two governments,—federal and State,—are coequal and co-ordinate governments; and, as such, neither can possess the right to decide as to the extent of its own powers, or to enforce its own decision against that of the other. The case is different with those who believe it to be partly national, and partly federal. They seem incapable of forming any definite or distinct opinion on the subject,—vital and important as it is.

Indeed, it is difficult to conceive how, with their views, any rational and fixed opinion can be formed on the subject: for, according to their theory, as far as it is national, it must possess the right contended for by those who believe it to be altogether national; and, on the other hand, as far as it is federal, it must possess the right, which those who believe it to be wholly federal contend for. But how the two can coexist, so that the government shall have the final right to decide on the extent of its powers, and to enforce its decisions as to one portion of its powers, and not as to the other, it is difficult to imagine. Indeed, the difficulty of realizing their views extends to the whole theory. Entertaining these different opinions, as to the true theory of the government, it follows, of course, that there must be an equal diversity of opinion, as to what constitutes a departure from it; and, that, what one considers a departure, the other must, almost necessarily, consider a conformity,—and, *vice versa*. When compared with these different views, the course of the government will be found to have conformed, much more closely, to the *national*, than to the *federal* theory.

At its outset, during the first Congress, it received an impulse in that direction, from which it has never yet recovered. Congress, among its earliest measures, adopted one, which, in effect, destroyed the relation of coequals and co-ordinates between the federal government and the governments of the individual States; without which, it is impossible to preserve its federal character. Indeed,

I might go further, and assert with truth, that without it, the former would, in effect, cease to be federal, and become national. It would be superior,—and the individual governments of the several States, would become subordinate to it,—a relation inconsistent with the federal, but in strict conformity to the national theory of the government.

I refer to the 25th section of the Judiciary Act, approved the 24th Sept., 1789. It provides for an appeal from, and revisal of a "final judgment or decree in any suit, in the highest courts of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States,—and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty,—or statute of, or commission held under, the United States, and the decision is against such title, &c., specially set up by either, &c." The effect, so far as these cases extend, is to place the highest tribunal of the States, both of law and equity, in the same relation to the Supreme Court of the United States, which the circuit and inferior courts of the United States bear to it. To this extent, they are made equally subordinate and subject to its control; and, of course, the judicial depart-

ments of the separate governments of the several States, to the same extent, cease to stand, under these provisions, in the relation of coequal and co-ordinate departments with the federal judiciary. Nor does the effect stop here. Their other departments, the legislative and executive,—to the same extent, through their respective State judiciaries, no longer continue to stand in the relation of coequals and co-ordinates with the corresponding departments of the federal government. The reason is obvious. As the laws and the acts of the government and its departments, can, if opposed, reach the people individually only through the courts,—to whatever extent the judiciary of the United States is made paramount to that of the individual States, to the same extent will the legislative and executive departments of the federal government,—and, thus, the entire government itself, be made paramount to the legislative and executive departments—and the entire governments of the individual States. It results, of course, that if the right of appeal from the State courts to those of the United States, should be extended as far as the government of the United States may claim that its powers and authority extend, the government of the several States would cease, in effect, to be its coequals and co-ordinates; and become, in fact, dependent upon, and subordinate to it. Such being the case, the important question presents itself for consideration,—does the constitution vest Congress with the power to pass an act authorizing such appeals?

It is certain, that no such power is expressly

delegated to it: and equally so, that there is none vested in it which would make such a power, as an incident, necessary and proper to carry it into execution. It would be vain to attempt to find either in the constitution. If, then, it be vested in Congress at all, it must be as a power necessary and proper to carry into execution some power vested in one of the two other departments,—or in the government of the United States, or some officer thereof: for Congress, by an express provision of the constitution, is limited, in the exercise of implied powers, to the passage of such laws only, as are necessary and proper to carry into effect, the powers vested in itself, or in some other department, or in the government of the United States, or some officer thereof. But it would be vain to look for a power, either in the executive department, or in the government of the United States or any of its officers, which would make a law, containing the provisions of the section in question, necessary and proper to carry it into execution. No one has ever pretended to find, or can find any such power in either, all, or any one of them. If, then, it exist at all, it must be among the powers of the department of the judiciary itself. But there is only one of its powers which has ever been claimed, or can be claimed, as affording even a pretext for making a law, containing such provisions, necessary and proper to carry it into effect. I refer to the second and third clauses of the third article of the constitution, heretofore cited. The second extends the judicial power "to all cases in law and equity, arising under this constitution, the

laws of the United States, and treaties made, or which shall be made under their authority;"—and to all cases between parties therein enumerated, without reference to the nature of the question in litigation. The third enumerates certain cases, in which the Supreme Court shall have original jurisdiction, and then provides, that "in all others before mentioned, it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The question is thus narrowed down to a single point;—Has Congress the authority, in carrying this power into execution, to make a law providing for an appeal from the courts of the several States, to the Supreme Court of the United States?

There is, on the face of the two clauses, nothing whatever to authorize the making of such a law. Neither of them names or refers, in the slightest manner to the States, or to the courts of the States; or gives the least authority, apparently, to legislate over or concerning either. The object of the former of these two clauses, is simply to extend the judicial power, so as to make it commensurate with the other powers of the government; and to confer jurisdiction over certain cases, not arising under the constitution, and laws of the United States, or treaties made under their authority. While the latter simply provides, in what cases the Supreme Court of the United States shall have original, and in what, appellate jurisdiction. Appellate stands in contradistinction to original jurisdiction, and as the

latter implies that the case must commence in the Supreme Court, so the former implies that the case must commence in an inferior court, not having final jurisdiction; and, therefore, liable to be carried up to a higher, for final decision. Now, as the constitution vests the judicial power of the United States, "in one Supreme Court, and such inferior courts, as Congress may, from time to time ordain," the natural and plain meaning of the clause is, that, in the cases enumerated, the Supreme Court should have original jurisdiction; and in all others, originating in the inferior courts of the United States, it should have jurisdiction only on an appeal from their decisions.

Such being the plain meaning and intent of these clauses,—the question is;—How can Congress derive from them, authority to make a law providing for an appeal from the highest courts of the several States, in the cases specified in the 25th sect. of the Judiciary Act, to the Supreme Court of the United States?

To this question no answer can be given, without assuming that the State courts,—even the highest,—stand in the relation of the inferior courts to the Supreme Court of the United States, wherever a question touching their authority comes before them. Without such an assumption, there is not, and cannot be, a shadow of authority to warrant an appeal from the former to the latter. But does the fact sustain the assumption? Do the courts of the States stand, as to such questions, in the relation of the inferior to the Supreme Court of the United

States? If so, it must, be by some provision of the constitution of the United States. It cannot be a matter of course. How can it be reconciled with the admitted principle, that the federal government and those of the several States, are each supreme in their respective spheres? Each, it is admitted, is supreme, as it regards the other, in its proper sphere; and, of course, as has been shown, coequal, and co-ordinate.*

* *Note.* Reference is here made to various pencil notes in the margin of the manuscript, which, from the contractions used, and the illegible manner in which they are written, I have not been able satisfactorily to decipher; and have, therefore, not incorporated with the text. They indicate that the author designed to have elaborated, more fully, this part of the subject;—and, as far as I can gather the meaning, to have shown that the State courts, in taking cognizance of cases, in which the constitution, treaties and laws of the United States are drawn in question, act, not in virtue of any provision of the constitution or laws of the United States, but by an authority independent of both. That this authority, is the constitution-making power—the people of the States respectively. That, according to a principle of jurisprudence, universally admitted, courts of justice must look to the *whole* law, by which their decisions are to be guided and governed.—That this principle is eminently applicable in the cases mentioned.—That, as the constitution and laws of the United States, are the constitution and laws of each State, the State courts must have the right,—and are in duty bound to decide on the validity of such laws as may be drawn in question, in all cases rightfully before them. And that the principle which would authorize an appeal from the decision of the highest judicial tribunal of a State, to the Supreme Court of the United States, in cases where the constitution, treaties and laws of the United States are drawn in question, would equally authorize an appeal from the latter to the former, in cases where the constitution and laws of the State have been drawn in question, and the decision has been adverse to them.—*Editor.*

If this be true, then the respective departments of each must be necessarily and equally so;—as the whole includes the parts. The State courts are the representatives of the reserved rights, vested in the governments of the several States, as far as it relates to the judicial power. Now as these are reserved *against* the federal government,—as the very object and intent of the reservation, was to place them beyond the reach of its control,—how can the courts of the States be inferior to the Supreme Court of the United States; and, of course, subject to have their decisions re-examined and reversed by it, without, at the same time, subjecting the portion of the reserved rights of the governments of the several States, vested in it, to the control of the federal government? Still higher ground may be taken. If the State courts stand in the relation of inferiors to the Supreme Court of the United States,—what reason can possibly be assigned, why the other departments of the State governments,—the legislative and executive, should not stand in the same relation to the corresponding departments of the federal government? Where is there to be found any provision of the constitution which makes, in this respect, any distinction between the judiciary and the other departments? Or, on what principle can such a distinction be made? There is no such distinction; and, it must follow, that if the judicial department, or the courts of the governments of the individual States, stand in the relation of inferior courts to the Supreme Court of the United States, the other departments must stand in the same rela-

tion to the corresponding departments of the federal government. It must also follow, that the governments of the several States, instead of being coequal and co-ordinate with the federal government, are inferior and subordinate. All these are necessary consequences.

But it may be alleged that the section in question does not assume the broad principle, that the State courts stand, in all cases, in the relation of the inferior courts to the Supreme Court of the United States; that it is restricted to appeals from the final judgments of the highest courts of the several States; to suits in law and equity, (excluding criminal cases,) and, in such cases, to those only, where the validity of a treaty, statute of, or an authority exercised under the United States; or the construction of the constitution, or of a treaty, or law of, or commission held under the United States, are drawn in question, and the decision is adverse to the right claimed under the United States; or, where the validity of any law of, or authority exercised under a State are involved, on the ground that they are repugnant to the constitution, treaties or laws of the United States,—and the decision is in favor of the law or the authority of the State. It may, also, be alleged that, to this extent, it was necessary to regard the courts of the States as inferior courts; and, as such, to provide for an appeal from them to the Supreme Court of the United States, in order to preserve uniformity in decisions; and to avoid collision and conflict between the federal government and those of the several States.

If uniformity of decision be one of the objects of the section, its provisions are very illy calculated to accomplish it. They are far better suited to enlarge the powers of the government of the United States, and to contract, to the same degree, those of the governments of the individual States, than to secure uniformity of decision. They provide for appeals only in cases where the decision is *adverse* to the power claimed for the former, or in *favor* of that of the latter. They assume that the courts of the States are always *right* when they decide in *favor* of the government of the United States, and always *wrong*, when they decide in *favor* of the power of their respective States; and, hence, they provide for an appeal in the latter case, but for none in the former. The result is, that if the courts of a State should commit an error, in deciding *against* the State, or in favor of the United States, and the Supreme Court of the latter should, in like cases, make the reverse decisions, the want of uniformity would remain uncorrected. Uniformity, then, would seem to be of no importance, when the decision was calculated to impair the reserved powers; and only so, when calculated to impair the delegated.

But it might have been thought, that, so strong would be the leaning of the State courts towards their respective States, there would be no danger of a decision against them, and in favor of the United States; except in cases, so clear as not to admit of a doubt. This might be the case, if all the State governments stood in antagonistic relations to the federal government. But it has been established

that such is not the case; and that, on the contrary, a majority of them must be, habitually, arrayed on its side; and their courts as much inclined to sustain its powers as its own courts. But if the State courts should have a strong leaning in favor of the powers of their respective States, what reason can be assigned, why the Supreme Court of the United States should not have a leaning, equally strong, in favor of the federal government? If one, in consequence, cannot be trusted in making a decision adverse to the delegated powers, on what principle can the other be trusted in making a decision adverse to the reserved powers? Is it to be supposed, that the judges of the courts of the States, who *are sworn to support the constitution of the United States*, are less to be trusted, in cases where the *delegated* powers are involved, than the federal judges, who *are not bound by oath to support the constitutions of the States*, are, in cases, where the *reserved* powers are concerned? Are not the two powers equally independent of each other? And is it not as important to protect the reserved against the encroachments of the delegated, as the delegated against those of the reserved powers? And are not the latter, being much the weaker, more in need of protection than the former? Why, then, not leave the courts of each, without the right of appeal, on either side, to guard and protect the powers confided to them respectively?

As far as uniformity of decision is concerned,—the appeal was little needed; and well might the author of the section in question be so indifferent

about securing it. The extension of the judicial power of the United States, so as to make it commensurate with the government itself, is sufficient, without the aid of an appeal from the courts of the States, to secure all the uniformity consistent with a federal government like ours. It gives choice to the plaintiff to institute his suit, either in the federal or State courts, at his option. If he select the latter, and its decision be adverse to him, he has no right to complain ; nor has he a right to a new trial in the former court, as it would, in reality be, under the cover of an appeal. He selected his tribunal, and ought to abide the consequences. But his fate would be a warning to all other plaintiffs in similar cases. It would show that the State courts were adverse ;—and admonish them to commence their suits in the federal courts ; and, thereby, uniformity of decision, in such cases, would be secured. Nor would the defendant, in such cases, have a right to complain, and have a new trial in the courts of the United States, if the decision of the State courts should be adverse to him. If he be a citizen of the State, he would have no right to do either, if the courts of his own State should decide against him ; nor could a resident of the State or sojourner in it,—since both, by voluntarily putting themselves under the protection of its laws, are bound to acquiesce in the decisions of its tribunals.

But there is another object which the appeal is well calculated to effect,—and for the accomplishment of which, its provisions are aptly drawn up, as far as they go ;—that is,—to decide all conflicts be-

tween the delegated and reserved powers, as to the extent of their respective limits, in favor of the former. For this purpose, it was necessary to provide for an appeal from the State courts, whenever their decisions were *in favor* of the power of the States, or *adverse* to the power of the United States. In no other cases was it necessary; and, hence, probably, the reason why it was limited to these, notwithstanding the alleged object. Uniformity of decision required it to embrace, not only these, but the reverse cases. As it stands, it enables the Supreme Court of the United States, in all cases of conflict between the two powers, coming within the provisions of the section, to overrule the decisions of the courts of the States, and to decide, exclusively, and in the last resort, as to the extent of the delegated powers.

The object of the section was, doubtless, to prevent collision between the federal and State governments,—the delegated and reserved powers,—by giving to the former, (and by far the stronger) through the Supreme Court,—the right, under the color of an appeal, to decide as to the extent of the former,—and to enforce its decisions against the resistance of a State. The expedient may, for a time, be effectual; but must, in the end, lead to collisions of the most dangerous character. It should ever be borne in mind, that collisions are incident to a division of power;—but that without division of power, there can be no organization; and without organization, no constitution; and without this no liberty. To prevent collision, then, by destroying the division of power, is, in effect, to substitute an absolute for a

constitutional government, and despotism in the place of liberty,—evils far greater than those intended to be remedied. It is the part of wisdom and patriotism, then, not to destroy the divisions of power in order to prevent collisions, but devise means, by which they may be prevented from leading to an appeal to force. This, as has been shown, the constitution, in a manner most safe and expedient, has provided through the amending power,—a power, so constituted as to preserve in all time, and under all circumstances, an equilibrium between the various divisions of power of which the system is composed.

It is true, as has been alleged, that the provisions of the section are restricted,—that they are limited to civil cases, and to appeals from the highest State courts to the Supreme Court of the United States. Thus restricted, they would not be sufficient to subject the reserved powers completely to the delegated, and to lead, at least,—speedily,—to all the consequences stated. But what assurance can there be, that the right, if admitted, will not be carried much further? The right of appeal itself, can only be maintained, as has been shown, on the assumption that the courts of the States stand in the relation of inferior courts to the Supreme Court of the United States. Resting on this broad assumption, no definite limits can be assigned to the right, if it exists at all. It may be extended to criminal as well as civil cases;—to the circuit courts of the United States as well as to the Supreme Court; to the transfer of a case, civil or criminal, at any stage,

before as well as after final decision, from the State courts to either the circuit or Supreme Court of the United States; to the exemption of all the employés and officers of the United States, when acting under the color of their authority, from civil and criminal proceedings in the courts of the State, and subjecting those of the States, acting under their respective laws, to the civil and criminal process of the United States; to authorize the judges of the United States court to grant writs of habeas corpus to persons confined under the authority of the States, on the allegation that the acts for which they were confined, were done under color of the authority of the United States; and, finally, to authorize the President to use the entire force of the Union —the militia, the army and navy—to enforce, in all such cases, the claim of power on the part of the United States. If the courts of the States, be, indeed, inferior courts,—if an appeal from them to the Supreme Court of the United States can be rightfully authorized by Congress, all this may be done. May! It has already been done. All that has been stated as possible, is but a transcript of the provisions of the act approved 3d March, 1833, entitled, "An act to provide for the collection of duties on imports;"—as far as it relates to the matter in question.

But if such powers can be rightfully vested in the courts of the United States by Congress, for the collection of the revenue, no reason can be assigned why it may not vest like powers in them to carry into execution any power which it may choose to

claim, or exercise. Take, for illustration, what is called the "guaranty section" of the constitution, which, among other things, provides that, "the United States shall guarantee to each State in this Union a republican form of government; and protect each of them, on application of the legislature, or of the executive (when the legislature cannot be convened,) against domestic violence." Congress, of course, as the representative of the United States, in their legislative capacity, has the right to make laws to carry these guaranties into execution. This involves the right, in reference to the first, to determine what form of government is republican. To decide this important question, the government of the United States and the several State governments, at the time the constitution of the United States was adopted and the States became members of the federal Union, furnished a plain and safe standard, as they were, of course, all deemed republican. But suppose Congress, instead of being regulated by it, should undertake to fix a standard, without regard to that fixed by those who framed, or those who adopted the constitution of the United States; and suppose it should adopt, what now, it is to be feared, is the sentiment of the dominant portion of the Union, that no government is republican where universal suffrage does not prevail,—where the numerical majority of the whole population is not recognized as the supreme governing power: And, suppose, acting on this false standard, that Congress should declare that the governments of certain States of the Union, a large portion of

whose population are not permitted to exercise the right of suffrage, were not republican; and should undertake, in execution of its declaration, to make laws to compel all such States to adopt governments conforming to its views, by extending the right of suffrage to every description of its population, and placing the power in the hands of the mere numerical majority. What, in such case, would there be to prevent Congress from adopting the provisions of the act of 3d March, 1833, to carry such laws into execution? If it had the right to adopt them, in that case, it would have an equal right to adopt them in the case supposed, or in any other that might be. No distinction can possibly be made between them, or between it and any other case, where Congress may claim to exercise a power. If it has the right to regard the courts of the States as standing in the relation of inferiors to the courts of the United States, *in any case*, it has a right to consider them so *in every case;* and, as such, subject to the authority of the latter, whenever, and to whatever extent it may think proper. What, then, would be the effect of extending the provisions of the act to the case supposed? The officers of the State, and all in authority under her, and all her citizens, who might stand up in defence of her government and institutions, would be regarded as insurgents, for resisting the act of Congress; and, as such, liable to be arrested, tried and punished by the courts of the United States; while those who might desert the State, and join in overthrowing her government and institutions, would be

protected by them against her laws and her courts. To be true to the State, would come to be regarded as treason to the United States, and punishable as the highest crime; whilst to be false to her, would come to be regarded as fidelity to them, and be a passport to the honors of the Union. More briefly, fidelity to her, would be treason to the United States, and treason to her, fidelity to them.

But the clause in question embraces the protection of the government of each State against domestic violence, as well as the guaranty of a republican form of government to each. Suppose, then, a party should be formed in any State to overthrow its government, on the ground that it was not republican,—because its constitution restricted the right of suffrage, and did not recognize the right of the numerical majority to govern absolutely. Suppose that this party should apply to Congress to enforce the pledge of the United States to guarantee a republican form of government,—and the State should apply to enforce the guaranty of protection against domestic violence,—and Congress should side with the former and pass laws to aid them: what reason can be assigned, why the provisions of the act of the 3d March, 1833, could not be extended to such a case,—and the government of the State, with all its functionaries, and all their aiders and abettors, be arrested, tried, convicted and punished as traitors, by the courts of the United States? And all, who combined to overthrow the government of the State, protected against the laws and courts of the State?

It may be objected that the supposition, in both cases, is imaginary and never can occur;—that it is not even to be supposed that Congress ever will so far forget its duty, as to pervert guaranties, solemnly entered into by the States, in forming a federal Union to protect each other in their republican forms of government,—and the separate government of each against domestic violence,—into means of effecting ends the very opposite of those intended. The objection, if it should ever be made, would indicate very little knowledge of the barriers which constitutions and plighted faith oppose to governments, when they can be transcended with impunity. They may not be openly assailed at first. They are usually sapped and undermined by construction, preparatory to their entire demolition. But what construction may fail to accomplish, the open assaults of fanaticism, or the lust of power, or the violence of party, will, in the end, prostrate. Of the truth of this, history, both political and religious, affords abundant proofs. Already our own furnishes many examples, of which, not a few, much to the point, might be cited. The very act, which the statute of the 3d March, 1833, was intended to enforce, was a gross and palpable perversion of the taxing power; and the movement to subvert the government of Rhode Island, a few years since, threatened, at one time, to furnish, by a like perversion of the guarantee to protect its government against domestic violence, the means of subverting it.

But it may be alleged that, if Congress should

so far forget its duty as to make the gross and dangerous perversion supposed, the State would find security in the independent tenure, by which the judges of the United States courts hold their office. As highly important as this tenure is to protect the judiciary against the encroachments of the other departments of the government, and to insure an upright administration of the laws, as between individuals, it would be greatly to over-estimate its importance to suppose, that it secures an efficient resistance against Congress, in the case supposed; or, more generally, against the encroachment of the federal government on the reserved powers. There are many and strong reasons why it cannot.

In the first place, all cases like those supposed, where the power is perverted from the object intended to be effected by it, and made the means of effecting another of an entirely different character, —are beyond the cognizance of the courts. The reason is plain. If the act be constitutional on its face; if its title be such as to indicate that the power exercised, is one which Congress is authorized by the constitution to exercise;—and there be nothing on the face of the act calculated, beyond dispute, to show it did not correspond with the purpose professed,—the courts cannot look beyond to ascertain the real object intended, however different it may be. It has (to illustrate by the case in question) the right to make laws to carry into execution the guaranty of a republican form of government to the several States of the Union; and, for this purpose, to determine whether the form of the

government of a certain State be republican or not. But if, under the pretext of exercising this power, it should use it for the purpose of subjecting to its control any obnoxious member, or members of the Union,—be it from the impulse of fanaticism, lust of power, party resentment, or any other motive, it would not be within the competency of the courts to inquire into the objects intended.

But, if it were otherwise,—if the judiciary could take cognizance of this, and any other description of perversion or infraction by the other departments, it could oppose no permanent resistance to them. The reason is to be found in the fact, that, like the others, it emanates from, and is under the control of the two combined majorities;—that of the States, and that of their populations, estimated in federal numbers. The independent tenure, by which the judges hold their office, may render the judiciary less easily and readily acted on by these united majorities; but as they become permanently concentrated in one of the sections of the Union, and as that section becomes permanently the dominant one, the judiciary must yield, ultimately, to its control. It would possess all the means of acting on the hopes and fears of the judges. As high as their office,—or independent as their tenure of office is, it does not place them above the influences which control the other members of government. They may aspire higher. The other judges of the Supreme Court, may, will, and honorably aspire to the place of the Chief Justice;—and he and all of his associates, to the highest post under the government. As

far as these influences extend, they must give a leaning to the side which can control the elections, and, through them, the department which has at its disposal the patronage of the government. Nor does their office place them beyond the reach of fear. As independent as it is, they are, like all the other officers of government, liable to be impeached: and the powers of impeaching and of trying impeachments, are vested, respectively, in the House of Representatives and the Senate,—both of which emanate directly from the combined majorities which control the government. But, if both hope and fear should be insufficient to overcome the independence of the judges, the appointing power, which emanates from the same source, would, in time, fill the bench with those only whose opinions and principles accord with the other departments. And hence, all reliance on the judiciary for protection, under the most favorable view that can be taken, must, in the end, prove vain and illusory.

I have now shown that the 25th section of the judiciary act is unauthorized by the constitution; and that it rests on an assumption which would give to Congress the right to enforce, through the judiciary department, whatever measures it might think proper to adopt; and to put down all resistance by force. The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy. It would be a waste of time to undertake to show that an assumption,

which would destroy the relation of co-ordinates between the government of the United States and those of the several States,—which would enable the former, at pleasure, to absorb the reserved powers and to destroy the institutions, social and political, which the constitution was ordained and established to protect, is wholly inconsistent with the federal theory of the government, though in perfect accordance with the national theory. Indeed, I might go further, and assert, that it is, of itself, all sufficient to convert it into a national, consolidated government;—and thus to consummate, what many of the most prominent members of the convention so long, and so perseveringly contended for. Admit the right of Congress to regard the courts of the States as inferior to those of the United States, and every other act of assumption is made easy. It is the great enforcing power to compel a State to submit to all acts, however unconstitutional, oppressive or outrageous,—or to oppose them at its peril. This one departure, of which the 25th section of the judiciary act was the entering wedge, and the act of the 3d March, 1833, the consummation, may be fairly regarded as the salient point of all others; —for without it, they either would not have occurred, or if they had, might have been readily remedied. Or, rather, without it, the whole course of the government would have been different,—the conflict between the co-ordinate governments, in reference to the extent of their respective powers, would have been subject to the action of the amending power; and thereby the equilibrium of the

system been preserved, and the practice of the government made to conform to its federal character.

It remains to be explained how, at its very outset, the government received a direction so false and dangerous. For this purpose it will be necessary to recur to the history of the formation and adoption of the constitution.

The convention which framed it, was divided, as has been stated, into two parties;—one in favor of a *national*, and the other of a *federal* government. The former, consisting, for the most part, of the younger and more talented members of the body, —but of the less experienced,—prevailed in the early stages of its proceedings. A negative on the action of the governments of the several States, in some form or other, without a corresponding one, on their part, on the acts of the government about to be formed, was indispensable to the consummation of their plan. They, accordingly, as has been shown, attempted, at every stage of the proceedings of the convention, and in all possible forms, to insert some provision in the constitution, which would, in effect, vest it with a negative;—but failed in all. The party in favor of a *federal* form, subsequently gained the ascendency;—the national party acquiesced, but without surrendering their preference for their own favorite plan;—or yielding, entirely, their confidence in the plan adopted, —or the necessity of a negative on the action of the separate governments of the States. They regarded the plan as but an experiment; and determined, as honest men and good patriots, to give

it a fair trial. They even assumed the name of federalists; and two of their most talented leaders, Mr. Hamilton and Mr. Madison, after the adjournment of the convention, and while the ratification of the constitution was pending, wrote the major part of that celebrated work, "The Federalist;" the object of which was to secure its adoption. It did much to explain and define it, and to secure the object intended; but it shows, at the same time, that its authors had not abandoned their predilection in favor of the national plan.

When the government went into operation, they both filled prominent places under it: Mr. Hamilton, that of secretary of the treasury—then, by far the most influential post belonging to the executive department,—if we except its head; and Mr. Madison, that of a member of the House of Representatives;—at the time, a much more influential body than the Senate, which sat with closed doors, on legislative, as well as executive business. No position could be assigned, better calculated to give them control over the action of the government, or to facilitate their efforts to carry out their predilections in favor of a national form of government, as far as, in their opinion, fidelity to the constitution would permit. How far this was, may be inferred from the fact, that their joint work, The Federalist, maintained that the government was partly federal and partly national, notwithstanding it calls itself "the government of the United States;"—and notwithstanding the convention repudiated the word "*national*," and designated it by

the name of "*federal*," in their letter laying the plan before the old Congress, as has been shown. When to this it is added, that the party, originally in favor of a national plan of government, was strongly represented, and that the President and Vice-President had, as was supposed, a leaning that way, it is not surprising that it should receive from the first, an impulse in that direction much stronger than was consistent with its federal character; and that some measure should be adopted calculated to have the effect of giving it, what was universally desired by that party in the convention, a negative on the action of the separate governments of the several States. Indeed, believing as they did, that they would prove too strong for the government of the United States, and that such a negative was indispensable to secure harmony, and to avoid conflict between them, it was their duty to use their best efforts to adopt some such measure; —provided that, in their opinion, there should be no constitutional objection in the way. Nor would it be difficult, under such impressions, to be satisfied with reasons in favor of the constitutionality of some such measure which, under a different, or neutral state of mind, would be rejected as having little or no weight. But there was none other, except that embraced in the 25th section of the judiciary act, which had the least show, even of plausibility in its favor;—and it is even probable that it was adopted without a clear conception of the principle on which it rested, or the extent to which it might be carried.

Many are disposed to attribute a higher authority to the early acts of the government, than they are justly entitled to;—not only because factions and selfish feelings had less influence at the time, but because many, who had been members of the convention, and engaged in forming the constitution, were members of Congress, or engaged in administering the government;—circumstances, which were supposed to exempt them from improper influence, and to give them better means of understanding the instrument, than could be possessed by those who had not the same advantages. The purity of their motives is admitted to be above suspicion; but it is a great error to suppose that they could better understand the system they had constructed, and the dangers incident to its operation, than those who came after them. It required time and experience to make them fully known,—as is admitted by Mr. Madison himself. After stating the difficulties to be encountered in forming a constitution, he asks; "Is it unreasonable to conjecture, that the errors which may be contained in the plan of the convention, are such as have resulted, rather from defect of antecedent experience on this complicated and difficult subject, than from the want of accuracy or care in the investigation of it, and, consequently, that they are such as will not be ascertained, until an actual trial will point them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular case of the articles of confederation. It is observable, that, among the numerous objections and

amendments suggested by the several States, when these articles were under consideration, not one is found which alludes to the great and radical error, which, on trial, has discovered itself!"* If this was true in reference to the confederacy,—an old and well known form of government,—how much more was actual trial necessary to point out the dangers to which the present system was exposed;—a system, so novel in its character, and so vastly more complicated than the confederacy? The very opinion, so confidently entertained by Mr. Madison, Gen. Hamilton, and the national party generally, (and which, in all probability led to the insertion of the 25th section of the judiciary bill,) that the federal government would prove too weak to resist the State governments,—strongly illustrates the truth of Mr. Madison's remarks. No one can now doubt, that the danger is on the other side. Indeed, the public man, who has had much experience of the working of the system, and does not more clearly perceive where the danger lies, than the ablest and most sagacious member of the convention, must be a dull observer.

But this is not the only instance of a great departure, during the same session, from the principles of the constitution. Among others, a question was decided in discussing the bill to organize the treasury department, which strikingly illustrates how imperfectly, even the framers of so complex a system as ours, understood it; and how necessary

* 38th No. of the Federalist.

time and experience were to a full knowledge of it. During the pendency of the bill, a question arose, whether the President, without the sanction of an act of Congress, had the power to remove an officer of the government, the tenure of whose office was not fixed by the constitution? It was elaborately discussed. Most of the prominent members took part in the debate. Mr. Madison, and others who agreed with him, insisted that he had the power. They rested their argument mainly on the ground, that it belonged to the class of executive powers; and that it was indispensable to the performance of the duty, "to take care that the laws be faithfully executed." Both parties agreed that the power was not expressly vested in him. It was, finally, decided that he had the power;—both sides overlooking a portion of the constitution which expressly provides for the case. I refer to a clause, already cited, and more than once alluded to, which empowers Congress to make all laws necessary and proper to carry its own powers into execution; and, also, whatever power is vested in the government, or any of its departments, or officers. And what makes the fact more striking, the very argument used by those, who contended that he had the power, independently of Congress, conclusively showed that it could not be exercised without its authority, and that the latter department had the right to determine the mode and manner in which it should be executed. For, if it be not expressly vested in the President, and only results as necessary and proper to carry into execution a power

vested in him, it irresistibly follows, under the provisions of the clause referred to, that it cannot be exercised without the authority of Congress. But while it effected this important object, the constitution provided means to secure the independence of the other departments; that of the executive, by requiring the approval of the President of all the acts of Congress;—and that of the judiciary, by its right to decide definitively, as far as the other departments are concerned, the constitutionality of all laws involved in cases brought before it.

No decision ever made, or measure ever adopted, except the 25th section of the judiciary act, has produced so great a change in the practical operation of the government, as this. It remains, in the face of this express and important provision of the constitution, unreversed. One of its effects has been, to change, entirely, the intent of the clause, in a most important particular. Its main object, doubtless, was, to prevent collision in the action of the government, without impairing the independence of the departments, by vesting *all discretionary power* in the Legislature. Without this, each department would have had equal right to determine what powers were necessary and proper to carry into execution the powers vested in it; which could not fail to bring them into dangerous conflicts, and to increase the hazard of multiplying unconstitutional acts. Indeed, instead of a government, it would have been little less than the *regime* of three separate and conflicting departments,—ultimately to be controlled by the executive; in consequence of its having the com-

mand of the patronage and forces of the Union. This is avoided, and unity of object and action is secured by vesting all its discretionary power in Congress; so that no department or officer of the government, can exercise any power not expressly authorized by the constitution or the laws. It is thus made a legal, as well as a constitutional government; and if there be any departure from the former, it must be either with the sanction or the permission of Congress. Such was the intent of the constitution; but it has been defeated, in practice, by the decision in question.

Another of its effects has been to engender the most corrupting, loathsome and dangerous disease, that can infect a popular government;—I mean that, known by the name of "*the Spoils.*" It is a disease easily contracted under all forms of government;—hard to prevent, and most difficult to cure, when contracted; but of all the forms of governments, it is, by far, the most fatal in those of a popular character. The decision, which left the President free to exercise this mighty power, according to his will and pleasure,—uncontrolled and unregulated by Congress, scattered, broadcast, the seeds of this dangerous disease, throughout the whole system. It might be long before they would germinate;—but that they would spring up in time; and, if not eradicated, that they would spread over the whole body politic a corrupting and loathsome distemper, was just as certain as any thing in the future. To expect, with its growing influence and patronage, that the honors and emoluments of the government

if left to the free and unchecked will of the Executive, would not be brought, in time, to bear on the presidential election, implies profound ignorance of that constitution of our nature, which renders governments necessary, to preserve society, and constitutions, to prevent the abuses of governments.

There was another departure during the same Congress, which was followed by important consequences; and which strikingly illustrates how dangerous it is for it to permit either of the other departments to exercise any power not expressly vested in it by the constitution, or authorized by law. I refer to the order issued by the, then, Secretary of the Treasury, Gen. Hamilton, authorizing, under certain restrictions, bank-notes to be received in payment of the dues of the government.

To understand the full extent of the evils consequent on this measure, it is necessary to premise, that, during the revolution, the country had been inundated by an issue of paper, on the part of the confederacy and the governments of the several States; and at the time the constitution was adopted, was suffering severely under its effects. To put an end to the evil, and to guard against its recurrence, the constitution vested Congress with the power, "to coin money, regulate the value thereof, and of foreign coins," and prohibited the States from "coining money, emitting bills of credit, and making any thing but gold and silver coin a tender in payment of debts." With the intent of carrying out the object of these provisions, Congress provided, in the act laying duties upon imports, that they should be

received in gold and silver coin only. And yet, the Secretary, in the face of this provision, issued an order, authorizing the collectors to receive bank-notes; and thus identified them, as far as the fiscal action of the government was concerned, with gold and silver coin, against the express provision of the act, and the intent of the constitution.

This departure led, almost necessarily, to another, which followed shortly after;—the incorporation of, what was called, in the report of the Secretary recommending its establishment, A NATIONAL BANK;—a report strongly indicating the continuance of his predilections in favor of a national government. I say, *almost necessarily;* for if the government has the right to receive, and actually receives and treats bank-notes as money, in its receipts and payments, it would seem to follow that it had the right, and was in duty bound, to adopt all means necessary and proper to give them uniformity and stability of value, as far as practicable. Thus the one departure led to the other, and the two combined, to great and important changes in the character and the course of the government.

During the same Congress, a foundation was laid for other and great departures; the results of which, although not immediately developed, have since led to the most serious evils. I refer to the report of the Secretary of the Treasury on the subject of manufactures. He contended, not only that duties might be imposed to encourage manufactures, but that it belonged (to use his own language) "to the discretion of the national Legislature to pronounce

upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no doubt, that whatever concerns the general interests of agriculture, of manufactures and of commerce, is within the sphere of the national councils, as far as regards an application of money." It is a bold and an unauthorized assumption, that Congress has the power to pronounce what objects belong, and what do not belong to the general welfare; and to appropriate money, at its discretion, to such as it may deem to belong to it. No such power is delegated to it;—nor is any such necessary and proper to carry into execution those which are delegated. On the contrary, to pronounce on the general welfare of the States is a high constitutional power, appertaining not to Congress, but to the people of the several States, acting in their sovereign capacity. That duty they performed in ordaining and establishing the constitution. This pronounced to what limits the general welfare extended, and beyond which it did not extend. All within them, appertained to the general welfare, and all without them, to the particular welfare of the respective States. The money power, including both the taxing and appropriating powers, and all other powers of the federal government are restricted to these limits. To prove, then, that any particular object belongs to the *general* welfare of the States of the Union, it is necessary to show that it is included in some one of the delegated powers, or is necessary and proper to carry some one of them into effect,—before a tax

can be laid or money appropriated to effect it. For Congress, then, to undertake to pronounce what does, or what does not belong to the general welfare,—without regard to the extent of the delegated powers,—is to usurp the highest authority;—one belonging exclusively to the people of the several States in their sovereign capacity. And yet, on this assumption, thus boldly put forth, in defiance of a fundamental principle of a federal system of government, most onerous duties have been laid on imports,—and vast amounts of money appropriated to objects not named among the delegated powers, and not necessary or proper to carry any one of them into execution; to the great impoverishment of one portion of the country, and the corresponding aggrandizement of the other.

Such are some of the leading measures, which were adopted, or had their origin during the first Congress that assembled under the constitution. They all evince a strong predilection for a national government; so strong, indeed, that very feeble arguments were sufficient to satisfy those, who had the control of affairs at the time; provided the measure tended to give the government an impulse in that direction. Not that it was intended to change its character from a *federal* to a *national* government (for that would involve a want of good faith),—but that it was thought to be necessary to strengthen it on, what was sincerely believed to be, its weak side. But, be this as it may, the government then received an impulse adverse to its federal, and in favor of a national, consolidated character, from

which it has never recovered;—and which, with slight interruption and resistance, has been constantly on the increase. Indeed, to the measures then adopted and projected, almost all subsequent departures from the federal character of the government, and all encroachments on the reserved powers may be fairly traced, numerous and great as they have been.

So many measures, following in rapid succession, and strongly tending to concentrate all power in the government of the United States, could not fail to excite much alarm among those who were in favor of preserving the reserved rights; and, with them, the federal character of the government. They, accordingly, soon began to rally in opposition to the Secretary of the Treasury and his policy, under Mr. Jefferson,—then Secretary of State,—and in favor of the reserved powers,—or, as they were called, "reserved rights," of the States. They assumed the name of the Republican party. Its great object was to protect the reserved, against the encroachments of the delegated powers; and, with this view, to give a direction to the government of the United States, favorable to the preservation of the one, and calculated to prevent the encroachment of the other. And hence they were often called, "the State Rights party."

Things remained in this state during the administration of General Washington;—but shortly after the accession of his successor—the elder Adams, the advocates of the reserved powers, became a regularly organized party in opposition to his adminis-

tration. The introduction of, what are well known as, the Alien and Sedition laws, was the immediate cause of systematic and determined resistance. The former was fiercely assailed, as wholly unauthorized by the constitution; and as vesting arbitrary and despotic power in the President, over alien friends as well as alien enemies;—and the latter, not only as unauthorized, but in direct violation of the provision of the constitution, which prohibits Congress from making any law "abridging the freedom of speech or of the press." The passage of these acts, especially the latter,—caused deep and general excitement and opposition throughout the Union; being intended, as was supposed, to protect the government in its encroachment on the reserved powers.

Virginia, seconded by Kentucky, took the lead in opposition to these measures. At the meeting of her legislature, ensuing their passage, a series of resolutions were introduced and passed, early in the session, declaratory of the principles of State rights, and condemnatory of the Alien and Sedition acts, and other measures of the government having a tendency to change its character from a federal to a national government. Among other things, these resolutions affirm that, "it (the General Assembly) views the powers of the federal government, as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact;—and that in

case of a deliberate, palpable, and dangerous exercise of other powers, not granted by said compact, the States who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights and liberties appertaining to them. That the general assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge its powers by a forced construction of the constitutional charter, which defines them; and that indications have appeared of a design to expound certain general phrases—(which having been copied from the very limited grant of powers, in the former articles of confederation, were the less liable to be misconstrued)—so as to destroy the meaning and effect of the particular enumeration, which, necessarily, explains and limits the general phrases; so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States into an absolute, or, at least, mixed monarchy."

The Kentucky resolutions, which are now known to have emanated from the pen of Mr. Jefferson,—then the Vice-President, and the acknowledged head of the party,—are similar in objects and substance with those of Virginia; but as they are differently expressed, and, in some respects, fuller than the latter, it is proper to give the two corresponding resolutions. The former is in the following

words: "That the several States, composing the United States of America, are not united on the principle of unlimited submission to the general government; but that, by a compact under the style and title of a constitution of the United States, and of amendments thereto, they constituted a general government for special purposes;—delegated to that government, certain definite powers; reserving, each State to itself, the residuary mass of right to their own self-government; that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each State acceded as a State, and is an integral party,—its co-States forming, as to itself, the other party; that the government created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to it—since that would have made its discretion, and not the constitution, the measure of its powers; but that, as in all other cases of compact among parties, having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress." The other is in the following words: "That the construction applied by the general government, (as evinced by sundry of their proceedings,) to those parts of the constitution of the United States, which delegate to Congress a power to lay and collect taxes, duties, imposts and excises; to pay the debts, and provide for the common defence and general welfare of the United States; and to make all laws necessary and proper for carrying into execution the powers vest-

ed by the constitution in the government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the constitution. That words, meant by that instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed, as themselves to give unlimited powers, nor a part so to be taken, as to destroy the whole residue of the instrument."

The resolutions adopted by both States were sent, by the governor of each, at the request of the general assembly of each, to the governors of the other States, to be laid before their respective legislatures.

In the mean time, Mr. Madison had retired from Congress and was elected a member of the legislature of his own State. As thoroughly in favor of a national government, as he had been in the convention; and as strong as his predilections in its favor continued to be, after the adoption of the federal plan of government, he could not, with the views he entertained of the present government, as being partly national and partly federal, go the whole length of the policy recommended and supported by General Hamilton;—and, accordingly, had separated from him and allied himself with Mr. Jefferson.

All the legislatures of the New England States, and that of New-York, responded unfavorably to the principles and views set forth in the Virginia and Kentucky resolutions, and in approbation of the course of the federal government. At the next

session of the General Assembly of Virginia, these resolutions were referred to a committee, of which Mr. Madison was the chairman. The result was a report from his pen, which triumphantly vindicated and established the positions taken in the resolutions. It successfully maintained, among other things, that the people of the States—acting in their sovereign capacity, have the right "to decide, in the last resort, whether the compact made by them be violated;" and shows, conclusively, that, without it, and the right of the States to interfere to protect themselves and the constitution, "there would be an end to all relief from usurped powers, and a direct subversion of the rights specified or recognized under all the State constitutions, as well as a plain denial of the fundamental principle, on which our independence itself was declared." It also successfully maintained "that the ultimate right of the parties to the constitution, to judge whether the compact has been dangerously violated, must extend to the violation by one delegated authority as well as another, by the judiciary, as well as by the executive or the legislative." And that, "however true, therefore, it may be, that the judicial department is, in all questions submitted to it by the forms of the constitution, to decide, in the last resort, this resort must necessarily be deemed the last in relation to the authority of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trust." It conclusively

refutes the position, taken by Gen. Hamilton, that it belongs to the discretion of the national legislature to pronounce upon objects, which concern the general welfare, as far as it regards the application of money, already quoted; denies the right of Congress to use the fiscal power, either in imposing taxes, or appropriating money, to promote any objects but those specified in the constitution;—shows that the effect of the right, for which he contends, would necessarily be consolidation,—by superseding the sovereignty of the States, and extending the power of the federal government to all cases whatsoever; and that, the effect of consolidation would be to transform our federal system into a monarchy.

The unfavorable responses of the other States were, by the House of Representatives of the Kentucky legislature, referred to the committee of the whole,—which reported a resolution containing a summary of their former resolutions, which was unanimously adopted. Among other things, it asserts, "that the several States, which formed that instrument (the constitution), being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unconstitutional acts, done under color of that instrument, is the rightful remedy."

The report of Mr. Madison, and the Virginia and Kentucky resolutions, constituted the political creed of the State rights republican party. They were understood as being in full accord with Mr. Jefferson's opinion, who was its acknowledged head.

They made a plain and direct issue with the principles and policy maintained by Gen. Hamilton,—who, although not nominally the head of the federal party, as they called themselves, was its soul and spirit. The ensuing presidential election was contested on this issue, and terminated in the defeat of Mr. Adams, the election of Mr. Jefferson as President, and the elevation of the republican party into power. To the principles and doctrines, so plainly and ably set forth in their creed, they owed their elevation, and the long retention of power under many and severe trials. They secured the confidence of the people, because they were in accord with what they believed to be the true character of the constitution, and of our federal system of government.

Mr. Jefferson came into power with an earnest desire to reform the government. He certainly did a good deal in undoing what had been done; and in arresting the progress of the government towards consolidation. His election caused the repeal, in effect, of the alien and sedition laws, and a permanent acquiescence in their unconstitutionality. They constituted the prominent questions in the issue between the parties in the contest. He did much to reduce the expenses of the government, and made ample provisions for the payment of the public debt. He took strong positions against the bank of the United States, and laid the foundation for its final overthrow. Amidst great difficulties, he preserved the peace of the country during the period of his administration. But he did nothing to arrest many

great and radical evils;—nothing towards elevating the judicial departments of the governments of the several States, from a state of subordination to the judicial department of the government of the United States, to their rightful, constitutional position, as co-ordinates; nothing towards maintaining the rights of the States as parties to the constitutional compact, to judge, in the last resort, as to the extent of the delegated powers; nothing towards restoring to Congress the exclusive right to adopt measures necessary and proper to carry into execution, its own, as well as all other powers vested in the government, or in any of its departments; nothing towards reversing the order of Gen. Hamilton which united the government with the banks; and nothing effectual towards restricting the money power to objects specifically enumerated and delegated by the constitution.

Why Mr. Jefferson should have failed to undo, effectually, the consolidating, national policy of Gen. Hamilton, and to restore the government to its federal character, many reasons may be assigned. In the first place, the struggle which brought him into power, was too short to make any deep and lasting impression on the great body of the community. It lasted but two or three years, and the principal excitement, as far as constitutional questions were concerned, turned on the two laws which were the immediate cause of opposition. In the next, the state of the world was such as to turn the attention of the government, mainly, to what concerned the foreign relations of the Union, and to

party contests growing out of them. To these it may be added, that Gen. Hamilton had laid the foundation of his policy so deep, and with so much skill, that it was difficult, if not impossible, to reverse it; at least, until time and experience should prove it to be destructive to the federal character of the government,—inconsistent with the harmony and union of the States, and fatal to the liberty of the people. It is, indeed, even possible that, not even he,—much less his cabinet and party generally,—had a just and full conception of the danger, and the utter impracticability of some of the leading measures of his policy.

Not long after the expiration of his term, his successor in the presidency, Mr. Madison, was forced into a war with Great Britain, after making every effort to avoid it. This, of course, absorbed the attention of the government and the country for the time, and arrested all efforts to carry out the doctrines and policy which brought the party into power. It did more; for the war, however just and necessary, gave a strong impulse adverse to the federal, and favorable to the national line of policy. This is, indeed, one of the unavoidable consequences of war; and can be counteracted, only by bringing into full action the negatives necessary to the protection of the reserved powers. These would, of themselves, have the effect of preventing wars, so long as they could be honorably and safely avoided; —and, when necessary, of arresting, to a great extent, the tendency of the government to transcend the limits of the constitution, during its prosecution;

and of correcting all departures, after its termination. It was by force of the tribunitial power, that the plebeians retained, for so long a period, their liberty, in the midst of so many wars.

How strong this impulse was, was not fully realized until after its termination. It left the country nearly without any currency, except irredeemable bank notes,—greatly depreciated, and of very different value in the different sections of the Union,——which forced on the government the establishment of another national bank ;—the charter of the first having expired without a renewal. This, and the embargo, with the other restrictive measures, which preceded it, had diverted a large portion of the capital of the country from commerce and other pursuits to manufactures ; which, in time, produced a strong pressure in favor of a protective tariff. The great increase, too, of the public expenditures of the government—in consequence of the war—required a corresponding increase of income; and this, of course, increased, in the same proportion, its patronage and influence. All these causes combined, could not fail to give a direction to the course of government, adverse to the federal and favorable to the national policy,—or, in other words, adverse to the principles and policy which brought Mr. Jefferson and the republican party into power, and favorable to those for which Mr. Adams and the federal party had contended.

In the mean time, the latter party was steadily undergoing the process of dissolution. It never recovered from the false step it took and the un-

wise course it pursued, during the war. It gradually lost its party organization; and even its name became extinct. But while this process was going on, the republican party, also, was undergoing a great change. It was gradually resolving itself into two parties; one of which was gradually departing from the State rights creed, and adopting the national. It rose into power, by electing the younger Adams, as the successor of Mr. Monroe, and took the name of the "*National Republican party.*" It differed little, in doctrine or policy, from the old federal party; but, in tone and character, was much more popular,—and much more disposed to court the favor of the people.

At the same time, the other portion of the party was undergoing a mutation, not less remarkable;—and which finally led to a change of name. It took the title of the "*Democratic party*," or,—more emphatically—"*the Democracy.*" The causes, which led to this change of name, began to operate before Mr. Monroe's administration expired. Indeed, with the end of his administration,—the last of the line of Virginia Presidents,—the old State rights party, ceased to exist as a party, after having held power for twenty-four years. The Democracy, certainly had much more affinity with it in feelings—but, as a party—especially its northern wing—had much less devotion to the reserved powers; and was much more inclined to regard mere numbers as the sole political element,—and the numerical majority as entitled to the absolute right to govern. It was, also, much more inclined to adopt the national than

the republican creed,—as far as the money power of the government was concerned; and, to this extent, much more disposed to act with the advocates of the former, than the latter.

No state of things could be more adverse to carrying out the principles and policy which brought the old republican party into power, or to restoring those of the party, which they expelled from power,—as events have proved. One of its first fruits was the passage of the act of 19th May, 1828, entitled, "An act in alteration of the several acts imposing duties on imports,"—called, at the time, the "Bill of Abominations,"—as it truly proved to be. It was passed by the joint support and vote of both parties—National Republicans, and those who, afterwards, assumed the name of "the Democracy," —the southern wing of each excepted. The latter, indeed, took the lead both in its introduction and support.

All preceding acts imposing duties, which this purported to alter, had some reference to, and regard for revenue; however much the rate of duties might have been controlled by the desire to afford protection. But such was not the case with this. It was passed under such circumstances as conclusively proved that it was intended, wholly and exclusively for protection; without any view, whatever, to revenue. The public debt, including the remnant of that contracted in the war of the Revolution, and the whole of that incurred in the war of 1812, was on the eve of being finally discharged, under the operation of the effective sinking fund,

established at the close of the latter. And so ample was the revenue, at the time, that fully one half of the whole, was annually applied to the discharge of the principal and interest of the public debt;—leaving an ample surplus, to meet the current expenses of the government on a liberal scale. It was clear, that under such circumstances, no increase of duties was required for revenue;—so clear, indeed, that the advocates of the bill openly avowed that its object was protection, not revenue; although they refused to adopt an amendment, which proposed to declare its real object, in order that its constitutionality might be decided by the judicial department.

It was under such circumstances that this act was passed; which, instead of reducing the duties one half, (to take effect after the final discharge of the public debt,) as, on every principle of revenue and justice,—of fairness and of good faith, it ought to have done, doubled them. I say of justice, fairness, and good faith,—because the duties were originally raised to meet the expenses of the war, and to discharge the public debt;—with the understanding, that when these objects were effected, they would be reduced,—and the burden they imposed on the tax-payers be lightened. Without this understanding they could not have been raised.

As, then, the duties imposed by the act, were not intended for revenue;—and as there is no power, specifically delegated to Congress, to lay duties except for revenue; it is obvious that it had no right to pass the bill, unless upon the principle con-

tended for by General Hamilton,—of applying the money power to accomplish whatever it might pronounce to be for the general welfare ;—not only by the direct appropriation of money, but by the imposition of duties and taxes. Indeed, there is no substantial difference between the two; for if Congress have the right to appropriate money, in the shape of bounties, to encourage manufactures,—it may, for the same purpose, lay protective duties, to give the manufacturer a monopoly of the home market, and *vice versa ;*—and such, accordingly, was the opinion of General Hamilton.

But, although the authors of this act aimed at transferring the bounty it conferred, directly into the pockets of the manufacturers, without passing through the treasury, yet they contemplated, and were prepared to meet the contingency of its bringing into the treasury a sum beyond the wants of the government, when the public debt should be extinguished. Their scheme was, to distribute the surplus among the States ;—that is, to appropriate to the government of each State, a sum proportioned to its representation in Congress, as an addition to its annual revenue. They thus assumed, not only, that Congress had a right to impose duties to provide, for what it might deem the *general welfare*, —but also, and at the same time, to appropriate the receipts derived from them to the States, respectively,—to be applied to their *individual* and *local welfare.* This last measure was urged, again and again, on Congress, and would, in all probability have been adopted, had not the act, of which it

was intended to have been a supplement, been arrested. A more extravagant and gross abuse of the money power can scarcely be conceived. Its consequences were as fatal as its violation of the constitution was outrageous and palpable. The vast surplus revenue, which it threw into the treasury notwithstanding its arrest, did much to corrupt both government and people; and was the principal cause of the explosion of the banking system in 1837; and the overthrow of the party in 1840, which took the lead in introducing and supporting it.

But these were not its only evil consequences. It led to another, and, if possible, a deeper and more dangerous inroad on the principles and policy which brought Mr. Jefferson and the old State rights party into power. The act of the 3d March, 1833, already referred to,—thoroughly subjecting the judicial departments of the governments of the several States to the federal judiciary, was introduced, expressly, to enforce this grossly unconstitutional and outrageous act. It received the support and votes—as did the original act,—both of the national and the democratic parties, (a few excepted, who still adhered to the creed of the old State rights party,) the latter taking the lead and direction in both instances.

It was thus, from the identity of doctrine and of policy which distinguished both parties, in reference to the money power, that two of the most prominent articles in the creed of the republican party, by force of which Mr. Jefferson, as its leader, came into

power, were set aside; and their dangerous opposites, on account of which, Mr. Adams, as the head of the federal party, was expelled, were brought into full and active operation;—namely,—the right claimed by the latter for Congress, to pronounce upon what appertains to the general welfare,—and which is so forcibly condemned in the Virginia and Kentucky resolutions, and the report of Mr. Madison;—and the right of the federal judiciary to decide, in the last resort, as to the extent of the reserved as well as of the delegated powers. The one authorizes Congress to do as it pleases,—and the other endows the court with the power to enforce whatever it may do,—if its authority should be adequate,—and if not, to call in the aid of the Executive with the entire force of the country. Their joint effect is to give unlimited control to the government of the United States, not only over those of the several States, but over the States themselves; in utter subversion of the relation of co-ordinates, and in total disregard of the rights of the several States, as parties to the constitutional compact, to judge, in the last resort, as to the extent of the powers delegated;—a right so conclusively established by Mr. Madison, in his report.

These measures greatly increased the power and patronage of the federal government; and with them, the desire to obtain its control; especially of the executive department,—which is invested mainly with the power of disposing of its honors and emoluments. As a necessary consequence of this, the presidential election became of more absorbing in-

terest,—the struggle between the two parties more and more intense;—and every means which promised success was readily resorted to, without the least regard to their bearing, morally or politically. To secure the desired object, the concentration of party action and the stringency of party discipline were deemed indispensable. And hence, contemporaneously with these measures, party conventions were, for the first time, called to nominate the candidates for the presidency and vice-presidency,—and party organization established all over the Union. And hence, also, for the first time, the power of removing from office, at the discretion of the President, so unconstitutionally conceded to him by the first Congress, was brought into active and systematic operation, as the means of rewarding partisan services, and of punishing party opposition or party delinquencies. In these measures the democratic party took the lead;—but were soon followed by their opponents. There is, at present, no distinction between them in this respect. The effects of the whole have been, to supersede the provision of the constitution, as far as it relates to the election of President and Vice-President, as has been shown; to give a decided control over these elections to those who hold or seek office; to stake all the powers and emoluments of the government as prizes, to be won or lost by victory or defeat; and to make success in the election paramount to every other consideration.

But there is another cause that has greatly contributed to place the control of the presidential elections in the hands of those who hold or seek office.

I allude, to what is called, the general ticket system; which has become, with the exception of a single State, the universal mode of appointing electors to choose the President and Vice-President. It was adopted to prevent a division of the vote of the several States, in the choice of their highest officers; and to make the election more popular, by giving it, as was professed to be its object, to the people. The former of these ends it has effected, but it has utterly failed as to the latter. It professes to give the people, individually, a right which it was impossible to exercise, except in the very smallest class of States, and even in these, very imperfectly. To call on a hundred thousand voters, scattered over fifty or sixty thousand square miles, to make out a ticket of a dozen or more electors, is to ask them to do that which, individually, they cannot properly or successfully do. Very few would have the information necessary to make a proper selection; and even if every voter had such information, the diversity of opinion and the want of concentration on the same persons, would be so great, that it would be a matter of mere accident, who would have the majority. To avoid this, a ticket must be formed by each party. But the few of each, who form the ticket, actually make the appointment of the electors; for the people individually, have no choice, but to vote for the one or the other ticket,—or otherwise, virtually, to throw away their vote;—for there would be no chance of success against the concentrated votes of the two parties. Never was there a scheme better contrived to transfer power from the body of the

community, to those whose occupation is to get or hold offices, and to merge the contests of party into a mere struggle for the spoils.

It is due to the Democratic party to state that, while they took the lead, and are principally responsible for bringing about this state of things, they are entitled to the credit of putting down the Bank of the United States; of checking extravagant expenditures on internal improvements; of separating the government from the banks; and, more recently, of opposing protective tariffs; and of adopting the ad valorem principle in imposing duties on imports. These are all important measures; and indicate a disposition to take a stand against the perversion of the money power. But, until the measures which led to these mischiefs,—and in the adoption of which they bore so prominent a part,—are entirely reversed, nothing permanent will be gained.

In the meanwhile the sectional tendency of parties has been increasing with the central tendency of the government. They are, indeed, intimately connected. The more the powers of the system are centralized in the federal government, the greater will be its power and patronage; proportionate with these, and increasing with their increase, will be the desire to possess the control over them, for the purpose of aggrandizement; and the stronger this desire, the less will be the regard for principles, and the greater the tendency to unite for sectional objects; —the stronger section with a view to power and aggrandizement,—the weaker, for defence and safety. Any strongly marked diversity will be sufficient to

draw the line; be it diversity of pursuit, of origin, of character, of habits, or of local institutions. The latter, being more deeply and distinctly marked than any other existing in the several States composing the Union, has, at all times, been considered by the wise and patriotic, as a delicate point,—and to be, with great caution, touched. The dangers connected with this, began to exhibit themselves in the old Congress of the confederation, in respect to the North-Western Territory; and continued down to the time of the formation of the present constitution. They constituted the principal difficulty in forming it; but it was fortunately overcome, and adjusted to the satisfaction of both parties.

For a long period, nothing occurred to disturb this happy state of things. But in the session of 1819–20, a question arose that exposed the latent danger. The admission of the territory of Missouri, as a State of the Union, was resisted on the ground that its constitution did not prohibit slavery. The contest, after a long and angry discussion, was finally adjusted by a compromise, which admitted her as a slaveholding State, on condition that slavery should be prohibited in all the territories belonging then to the United States, lying north of 36° 30′. This compromise was acquiesced in by the people of the South; and the danger, apparently, and, as every one supposed, permanently removed. Experience, however, has proved how erroneous were their calculations. The disease lay deep. It touched a fanatical as well as a political cord. There were not a few in the northern portion of the Union, who

believed that slavery was a sin, as well as a great political evil; and who remained quiet in reference to it, only because they believed that it was beyond their control;—and that they were in no way responsible for it. So long as the government was regarded as a federal government with limited powers, this belief of the sinfulness of slavery remained in a dormant state,—as it still does in reference to the institution in foreign countries; but when it was openly proclaimed, as it was by the passage of the act of 1833, that the government had the right to judge, in the last resort, of the extent of its powers; and to use the military and naval forces of the Union to carry its decisions into execution; and when its passage by the joint votes of both parties furnished a practical assertion of the right claimed in an outrageous case, the cord was touched which roused it into action. The effects were soon made visible. In two years thereafter, in 1835, a systematic movement was, for the first time, commenced to agitate the question of abolition, by flooding the southern States with documents calculated to produce discontent among the slaves;—and Congress, with petitions to abolish slavery in the District of Columbia.

The agitation was, however, at first, confined comparatively to a few; and they obscure individuals without influence. The great mass of the people viewed it with aversion. But here again, the same measure which roused it into action, mainly contributed to keep alive the agitation, and ultimately to raise a party (consisting, at first, of a few fanatics)

sufficiently numerous and powerful to exercise a controlling influence over the entire northern section of the Union. By the great increase of power and patronage which it conferred on the government, it contributed vastly to increase the concentration and intensity of party struggles, and to make the election of President the all absorbing question. The effect of this was, to induce both parties to seek the votes of every faction or combination by whose aid they might hope to succeed;—flattering them in return, with the prospect of establishing the doctrines they professed, or of accomplishing the objects they desired. This state of things could not fail to give importance to any fanatical party, however small, which cared more for the object that united them, than for the success of either party; especially if it should be of a character to accord, in the abstract, with the feeling of that portion of the community generally. Each of the great parties, in order to secure their support, would, in turn, endeavor to conciliate them, by professing a great respect for them, and a disposition to aid in accomplishing the objects they wished to effect. This dangerous system of electioneering could not fail to increase the party, and to give it great additional strength; to be followed, of course, by an increased anxiety on the part of those who desired its aid, to conciliate its favor; thus keeping up the action and reaction of those fatal elements, from day to day,—the one, rising in importance, as its influence extended over the section—the other sinking in subserviency to its principles and purposes.

In the meantime, the same causes must needs contribute, in the other section, to a state of things well calculated to aid this process. In proportion to the power and patronage of the government, would be the importance, to party success, of concentration and intensity in party struggles: and in proportion to these, the attachment and devotion to party, where the spoils are the paramount object. In the same proportion also, would be the unwillingness of the two wings of the respective parties, in the different sections, to separate, and their desire to hold together; and, of course, the disposition on the part of that in the weaker, to excuse and palliate the steps taken by their political associates in the stronger section, to conciliate the abolition party, in order to obtain its votes. Thus the section assaulted would be prevented from taking any decided stand to arrest the danger, while it might be safely and easily done;—and seduced to postpone it, until it shall have acquired,—as it already has done,—a magnitude, almost, if not altogether, beyond the reach of means within the constitution. The difficulty and danger have been greatly increased, since the Missouri compromise; and the other sectional measures, in reference to the recently acquired territories, now in contemplation (should they succeed), will centralize the two majorities that constitute the elements of which the government of the United States is composed, permanently in the northern section; and thereby subject the southern, on this, and on all other questions, in which their feelings or interest may come in conflict, to its control.

Such has been the practical operation of the government, and such its effects. It remains to be considered, what will be the consequence? to what will the government of the numerical majority probably lead?

On this point, we are not without some experience. The present disturbed and dangerous state of things are its first fruits. It is the legitimate result of that long series of measures, (of which the acts of the 19th of May, 1828, and the 3d of March, 1833, are the most prominent,) by which the powers of the whole system have been concentrated, virtually, in the government of the United States; and thereby transformed it from its original federal character, into the government of the numerical majority. To these fatal measures are to be attributed the violence of party struggles;—the total disregard of the provisions of the constitution in respect to the election of the President; the predominance of the honors and emoluments of the government over every other consideration; the rise and growth of the abolition agitation; the formation of geographical parties; and the alienation and hostile feelings between the two great sections of the Union. These are all the unavoidable consequences of the government of the numerical majority, in a country of such great extent, and with such diversity of institutions and interests as distinguish ours. They will continue, with increased and increasing aggregation, until the end comes. In a country of moderate extent, and with an executive department less powerfully constituted than in ours, this termina-

tion would be in an appeal to force, to decide the contest between the two hostile parties; and in a monarchy, by the commander of the successful party becoming master of both, and of the whole community, as has been stated. But there is more uncertainty in a country of such extent as ours, and where the executive department is so powerfully constituted. The only thing that is certain is, that it cannot last. But whether it will end in a monarchy, or in disunion, is uncertain. In the one or the other it will, in all probability, terminate if not prevented; but in which, time alone can decide. There are powerful influences in operation;—a part impelling it towards the one, and a part towards the other.

Among those impelling it towards monarchy, the two most prominent are, the national tendency of the numerical majority to terminate in that form of government; and the structure of the executive department of the government of the United States. The former has been fully explained in the preliminary discourse, and will be passed over with the single remark,—that it will add great force to the impulse of the latter in the same direction. To understand the extent of this force will require some explanation.

The vast power and patronage of the department are vested in a single officer, the President of the United States. Among these powers, the most prominent, as far as it relates to the present subject, are those which appertain to the administration of the government; to the office of commander in

chief of the army and navy of the United States; to the appointment of the officers of the government, with few exceptions; and to the removal of them at his pleasure,—as his authority has been interpreted by Congress. These, and especially the latter, have made his election the great and absorbing object of party struggles; and on this the appeal to force will be made, whenever the violence of the struggle and the corruption of parties will no longer submit to the decision of the ballot-box. To this end it must come, if the force impelling it in the other direction should not previously prevail. If it comes to this, it will be, in all probability, in a contested election; when the question will be, Which is the President? The incumbent,—if he should be one of the candidates,—or, if not, the candidate of the party in possession of power? or of the party endeavoring to obtain possession? On such an issue, the appeal to force would make the *candidate* of the successful party, master of the whole,—and not the *commander*, as would be the case under different circumstances.

The contest would put an end, virtually, to the elective character of the department. The form of election might, for a time, be preserved; but the ballot-box would be much less relied on for the decision, than the sword and bayonet. In time, even the form would cease, and the successor be appointed by the incumbent:—and thus the absolute form of a popular, would end in the absolute form of a monarchical government. Scarcely a possibility would exist of forming a constitutional monarchy. There

would be no material out of which it could be formed; and if formed, it would be too feeble, with such material as would constitute it, to hold in subjection a country of such great extent and population as ours must be.

Such will be the end to which the government, as it is now operating, must, in all probability, come, should the other alternative not occur, and nothing, in the meantime, be done to prevent it. It is idle to suppose that, operating as the system now does—with the increase of the country in extent, population and wealth, and the consequent increase of the power and patronage of the government, the head of the executive department can remain elective. The future is indeed, for the most part, uncertain; but there are causes in the political world as steady and fixed in their operation, as any in the physical; and among them are those, which, *subject to the above conditions*, will lead to the result stated.

Those impelling the government towards disunion are, also, very powerful. They consist chiefly of two; the one, arising from the great extent of the country:—the other, from its division into separate States, having local institutions and interests. The former, under the operation of the numerical majority, has necessarily given to the two great parties, in their contest for the honors and emoluments of the government, a geographical character; for reasons which have been fully stated. This contest must finally settle down in a struggle on the part of the stronger section to obtain the permanent control; and on the part of the weaker to preserve its

independence and equality as members of the Union. The conflict will thus become one between the States, occupying the different sections;—that is, between organized bodies on both sides; each, in the event of separation, having the means of avoiding the confusion and anarchy, to which the parts would be subject without such organization. This would contribute much to increase the power of resistance on the part of the weaker section against the stronger, in possession of the government. With these great advantages and resources, it is hardly possible that the parties occupying the weaker section, would consent, quietly, under any circumstances, to sink down from independent and equal sovereignties, into a dependent and colonial condition;—and still less so, under circumstances that would revolutionize them *internally*, and put their very existence, as a people, at stake. Never was there an issue between independent States that involved greater calamity to the conquered, than is involved in that between the States which compose the two sections of this Union. The condition of the weaker, should it sink from a state of independence and equality to one of dependence and subjection, would be more calamitous than ever before befell a civilized people. It is vain to think that, with such consequences before them, they will not resist; especially when resistance *may* save them, and cannot render their condition worse. That this will take place, unless the stronger section desists from its course, may be assumed as certain: and that—if forced to resist, the weaker section would

prove successful, and the system end in disunion, is, to say the least, highly probable. But if it should fail, the great increase of power and patronage which must, in consequence, accrue to the government of the United States, would but render certain, and hasten the termination in the other alternative. So that, at all events, to the one, or to the other,—to monarchy, or disunion it must come, if not prevented by strenuous and timely efforts. And this brings up the question,—How is it to be prevented? How can these sad alternatives be averted?

For this purpose, it is indispensable that the government of the United States should be restored to its federal character. Nothing short of a perfect restoration, as it came from the hands of its framers, can avert them. It is folly to suppose that any popular government, except one strictly federal, in *practice*, as well as in *theory*, can last, over a country of such vast extent and diversity of interests and institutions. It would not be more irrational to suppose, that it could last, without the responsibility of the rulers to the ruled. The tendency of the former to oppress the latter, is not stronger than is the tendency of the more powerful section, to oppress the weaker. Nor is the right of suffrage more indispensable to enforce the responsibility of the rulers to the ruled, than a *federal organization*, to compel the parts to respect the rights of each other. It requires the united action of both to prevent the abuse of power and oppression; and to constitute, really and truly, a constitutional govern-

ment. To supersede either, is to convert it *in fact*, whatever may be its *theory*, into an absolute government.

But it cannot be restored to its federal character, without restoring the separate governments of the several States, and the States themselves, to their true position. From the latter the whole system emanated. They ordained and established all the parts; first, by their separate action, their respective State governments; and next, by their concurrent action, with the indispensable co-operation of their respective governments, they ordained and established a common government, as a supplement to their separate governments. The object was, to do that, by a *common agent*, which could not be as well done, or done at all, by their separate agencies. The relation, then, in which the States stand to the system, is that of the creator to the creature; and that, in which the two governments stand to each other, is of coequals and co-ordinates—as has been fully established:—with the important difference, in this last respect, that the separate governments of the States were the first in the order of time, and that they exercised an active and indispensable agency in the creation of the common government of all the States; or, as it is styled, the government of the United States.

Such is their true position;—a position, not only essential in *theory*, in the *formation* of a federal government—but to its *preservation* in *practice*. Without it, the system could not have been formed,—and without it, it cannot be preserved. The super-

vision of the creating power is indispensable to the preservation of the created. But they no longer retain their true position. In the practical operation of the system, they have both been superseded and reduced to subordinaate and dependent positions: and this, too, by the power last in the order of formation, and which was brought into existence, as auxiliary to the first,—and through the aid of its active co-operation. It has assumed control over the whole;—and thus a thorough revolution has been effected, the creature taking the place of the creator. This must be reversed, and each restored to its true position, before the federal character of the government can be perfectly restored.

For this purpose the first and indispensable step is to repeal the 25th sect. of the judiciary act,—the whole of the act of the 3d of March, 1833, and all other acts containing like provisions. These, by subjecting the judiciary of the States to the control of the federal judiciary, have subjected the separate governments of the several States, including all their departments and functionaries,—and, thereby, the States themselves, to a subordinate and dependent condition. It is only by their repeal, that the former can be raised to their true relation as co-equals and co-ordinates,—and the latter can retain their high sovereign power of deciding, in the last resort, on the extent of the delegated powers, or of interposing to prevent their encroachment on the reserved powers. It is only by restoring these to their true position, that the government of the United States can be reduced to its true position,

as the coequal and co-ordinate of the separate governments of the several States, and restricted to the discharge of those auxiliary functions assigned to it by the constitution.

But this indispensable and important step will have to be followed by several others, before the work of restoration will have been completed. One of the most important will be, the repeal of all acts by which the money power is carried beyond its constitutional limits, either in laying duties, or in making appropriations. The federal character of the government may be as effectually destroyed by encroaching on, and absorbing all the reserved powers, as by subjecting the governments of the several States themselves directly to its control. Either would make it, in fact, the sole and absolute power, and virtually, the government of the numerical majority. But of all the powers ever claimed for the government of the United States, that which invests Congress with the right to determine what objects belong to the general welfare,—to use the money power in the form of laying duties and taxes, and to make appropriations for the purpose of promoting such as it may deem to be of this character, is the most encroaching and comprehensive. In civilized communities, money may be said to be the universal means, by which all the operations of governments are carried on. If, then, it be admitted, that the government of the United States has the right to decide, at its discretion, what is, and what is not for the common good of the country, and to lay duties and taxes, and to appropriate

their proceeds to effect whatever it may determine to be for the common good, it would be difficult to assign any limits to its authority, or to prevent it from absorbing, finally, all the reserved powers, and thereby, destroying its federal character.

But still more must be done to complete the work of restoration. The executive department must be rigidly restricted within its assigned limits, by divesting the President of all discretionary powers, and confining him strictly to those expressly conferred on him by the constitution and the acts of Congress. According to the express provisions of the former, he cannot rightfully exercise any other. Nor can he be permitted to go beyond, and to assume the exercise of whatever power he may deem necessary to carry those vested in him into execution, without finally absorbing all the powers vested in the other departments and making himself absolute. Having the disposal of the patronage of the government, and the command of all its forces, and standing at the head of the dominant party for the time, he will be able, in the event of a contest between him and either of the other departments, as to the extent of their respective powers, to make good his own, against its construction.

There is still another step, connected with this, which will be necessary to complete the work of restoration. The provisions of the constitution in reference to the election of the President and Vice-President, which has been superseded in *practice*, must be restored. The virtual repeal of this provi-

sion, as already stated, has resulted in placing the control of their election in the hands of the leaders of the office-seekers and office-holders; and this, with the unrestricted power of removal from office, and the vast patronage of the government, has made their election the all absorbing question; and the possession of the honors and emoluments of the government, the paramount objects in the Presidential contest. The effect has been, to increase vastly the authority of the President, and to enable him to extend his powers with impunity, under color of the right conceded him, against the express provision of the constitution, of deciding what means are necessary to carry into execution the powers vested in him. The first step in the enlargement of his authority, was to pervert the power of removal, (the intent of which was, to enable him to supply the place of an incompetent or an unworthy officer, with the view of better administering the laws,) into an instrument for punishing opponents and rewarding partisans. This has been followed up by other acts, which have greatly changed the relative powers of the departments, by increasing those of the executive. Even the power of making war,—and the unlimited control over all conquests, during its continuance, have, it is to be apprehended, passed from Congress into the hands of the President. His powers, in consequence of all this, have accumulated to a degree little consistent with those of a chief magistrate of a federal republic; and hence, the necessity for reducing them within their strict constitutional limits, and restoring the provisions of

the constitution in reference to his election, in order to restore the government completely to its federal character. Experience may, perhaps, prove, that the provisions of the constitution in this respect are imperfect,—that they are too complicated and refined for practice; and that a radical change is necessary in the organization of the executive department. If such should prove to be the case, the proper remedy would be, not to supersede them in practice, as has been done, but to apply to the power which has been provided to correct all its defects and disorders.

But the restoration of the government to its federal character, however entire and perfect it may be,—will not, of itself, be sufficient to avert the evil alternatives,—to the one or the other of which it must tend, as it is now operating. Had its federal character been rigidly maintained in practice from the first, it would have been all sufficient, in itself, to have secured the country against the dangerous condition in which it is now placed, in consequence of a departure from it. But the means which may be sufficient to *prevent* diseases, are not usually sufficient to *remedy* them. In slight cases of recent date, they may be;—but additional means are necessary to restore health, when the system has been long and deeply disordered. Such, at present, is the condition of our political system. The very causes which have occasioned its disorders, have, at the same time, led to consequences, not to be removed by the means which would have prevented them. They have destroyed the equilibrium between the

two great sections, and alienated that mutual attachment between them, which led to the formation of the Union, and the establishment of a common government for the promotion of the welfare of all.

When the government of the United States was established, the two sections were nearly equal in respect to the two elements of which it is composed; a fact which, doubtless, had much influence, in determining the convention to select them as the basis of its construction. Since then, their equality in reference to both, has been destroyed, mainly through the action of the government established for their mutual benefit. The first step towards it occurred under the old Congress of the confederation. It was among its last acts. It took place while the convention, which formed the present constitution and government, was in session, and may be regarded as contemporaneous with it. I refer to the ordinance of 1787; which, among other things, contained a provision excluding slavery from the North-Western Territory; that is, from the whole region lying between the Ohio and Mississippi rivers. The effect of this was, to restrict the Southern States, in that quarter, to the country lying south of it; and to extend the Northern over the whole of that great and fertile region. It was literally to restrict the one and extend the other; for the whole territory belonged to Virginia, the leading State of the former section. She, with a disinterested patriotism rarely equalled, ceded the whole, gratuitously, to the Union,—with the exception of a very limited portion, reserved for the payment of her officers and

soldiers, for services rendered in the war of the revolution. The South received no equivalent for this magnificent cession, except a pledge inserted in the ordinance, similar to that contained in the constitution of the United States, to deliver up fugitive slaves. It is probable that there was an understanding among the parties, that it should be inserted in both instruments;—as the old Congress and the convention were then in session in the same place; and that it contributed much to induce the southern members of the former to agree to the ordinance. But be this as it may, both, in practice, have turned out equally worthless. Neither have, for many years, been respected. Indeed, the act itself was unauthorized. The articles of confederation conferred not a shadow of authority on Congress to pass the ordinance,—as is admitted by Mr. Madison; and yet this unauthorized, one-sided act (as it has turned out to be), passed in the last moments of the old confederacy, was relied on, as a precedent, for excluding the South from two thirds of the territory acquired from France by the Louisiana treaty, and the whole of the Oregon territory; and is now relied on to justify her exclusion from all the territory acquired by the Mexican war,—and all that may be acquired,—in any manner, hereafter. The territory from which she has already been excluded, has had the effect to destroy the equilibrium between the sections as it originally stood; and to concentrate, permanently, in the northern section the two majorities of which the government of the United States is composed. Should

she be excluded from the territory acquired from Mexico, it will give to the Northern States an overwhelming preponderance in the government.

In the meantime the spirit of fanaticism, which had been long lying dormant, was roused into action by the course of the government,—as has been explained. It aims, openly and directly, at destroying the existing relations between the races in the southern section; on which depend its peace, prosperity and safety. To effect this, exclusion from the territories is an important step; and, hence, the union between the abolitionists and the advocates of exclusion, to effect objects so intimately connected.

All this has brought about a state of things hostile to the continuance of the Union, and the duration of the government. Alienation is succeeding to attachment, and hostile feelings to alienation; and these, in turn, will be followed by revolution, or a disruption of the Union, unless timely prevented. But this cannot be done by restoring the government to its federal character;—however necessary that may be as a first step. What has been done cannot be undone. The equilibrium between the two sections has been permanently destroyed by the measures above stated. The northern section, in consequence, will ever concentrate within itself the two majorities of which the government is composed; and should the southern be excluded from all territories, now acquired, or to be hereafter acquired, it will soon have so decided a preponderance in the government and the Union, as to be able to mould the constitution to its pleasure. Against this, the restoration of the

federal character of the government can furnish no remedy. So long as it continues, there can be no safety for the weaker section. It places in the hands of the stronger and hostile section, the power to crush her and her institutions; and leaves her no alternative, but to resist, or sink down into a colonial condition. This must be the consequence, if some effectual and appropriate remedy be not applied.

The nature of the disease is such, that nothing can reach it, short of some organic change,—a change which shall so modify the constitution, as to give to the weaker section, in some one form or another, a negative on the action of the government. Nothing short of this can protect the weaker, and restore harmony and tranquillity to the Union, by arresting, effectually, the tendency of the dominant and stronger section to oppress the weaker. When the constitution was formed, the impression was strong, that the tendency to conflict would be between the larger and smaller States; and effectual provisions were, accordingly, made to guard against it. But experience has proved this to have been a mistake; and that, instead of being, as was then supposed, the conflict is between the two great sections, which are so strongly distinguished by their institutions, geographical character, productions and pursuits. Had this been then as clearly perceived as it now is, the same jealousy which so vigilantly watched and guarded against the danger of the larger States oppressing the smaller, would have taken equal precaution to guard against the same danger between the two sections. It is for us, who see and feel it,

to do, what the framers of the constitution would have done, had they possessed the knowledge, in this respect, which experience has given to us;—that is, —provide against the dangers which the system has practically developed; and which, had they been foreseen at the time, and left without guard, would undoubtedly have prevented the States, forming the southern section of the confederacy, from ever agreeing to the constitution; and which, under like circumstances, were they now out of, would for ever prevent them from entering into, the Union.

How the constitution could best be modified, so as to effect the object, can only be authoritatively determined by the amending power. It may be done in various ways. Among others, it might be effected through a reorganization of the executive department; so that its powers, instead of being vested, as they now are, in a single officer, should be vested in two;—to be so elected, as that the two should be constituted the special organs and representatives of the respective sections, in the executive department of the government; and requiring each to approve all the acts of Congress before they shall become laws. One might be charged with the administration of matters connected with the foreign relations of the country;—and the other, of such as were connected with its domestic institutions; the selection to be decided by lot. It would thus effect, more simply, what was intended by the original provisions of the constitution, in giving to one of the majorities composing the government, a decided preponderance in the electoral college,—and to the other

majority a still more decided influence in the eventual choice,—in case the college failed to elect a President. It was intended to effect an equilibrium between the larger and smaller States in this department,—but which, in practice, has entirely failed; and, by its failure, done much to disturb the whole system, and to bring about the present dangerous state of things.

Indeed, it may be doubted, whether the framers of the constitution did not commit a great mistake, in constituting a single, instead of a plural executive. Nay, it may even be doubted whether a single chief magistrate,—invested with all the powers properly appertaining to the executive department of the government, as is the President,—is compatible with the permanence of a popular government; especially in a wealthy and populous community, with a large revenue and a numerous body of officers and employées. Certain it is, that there is no instance of a popular government so constituted, which has long endured. Even ours, thus far, furnishes no evidence in its favor, and not a little against it; for, to it, the present disturbed and dangerous state of things, which threatens the country with monarchy, or disunion, may be justly attributed. On the other hand, the two most distinguished constitutional governments of antiquity, both in respect to permanence and power, had a dual executive. I refer to those of Sparta and of Rome. The former had two hereditary, and the latter two elective chief magistrates. It is true, that England, from which ours, in this respect, is copied, has a single heredita-

ry head of the executive department of her government;—but it is not less true, that she has had many and arduous struggles, to prevent her chief magistrate from becoming absolute; and that, to guard against it effectually, she was finally compelled to divest him, substantially, of the power of administering the government, by transferring it, practically, to a cabinet of responsible ministers, who, by established custom, cannot hold office, unless supported by a majority of the two houses of Parliament. She has thus avoided the danger of the chief magistrate becoming absolute; and contrived to unite, substantially, a single with a plural executive, in constituting that department of her government. We have no such guard, and can have none such, without an entire change in the character of our government; and her example, of course, furnishes no evidence in favor of a single chief magistrate in a popular form of government like ours,—while the examples of former times, and our own thus far, furnish strong evidence against it.

But it is objected that a plural executive necessarily leads to intrigue and discord among its members; and that it is inconsistent with prompt and efficient action. This may be true, when they are all elected by the same constituency; and may be a good reason, where this is the case, for preferring a single executive, with all its objections, to a plural executive. But the case is very different where they are elected by different constituencies,—having conflicting and hostile interests; as would be the fact in the case under consideration. Here the two would

have to act, concurringly, in approving the acts of Congress,—and, separately, in the sphere of their respective departments. The effect, in the latter case, would be, to retain all the advantages of a single executive, as far as the administration of the laws were concerned; and, in the former, to insure harmony and concord between the two sections, and, through them, in the government. For as no act of Congress could become a law without the assent of the chief magistrates representing both sections, each, in the elections, would choose the candidate, who, in addition to being faithful to its interests, would best command the esteem and confidence of the other section. And thus, the presidential election, instead of dividing the Union into hostile geographical parties, the stronger struggling to enlarge its powers, and the weaker to defend its rights,—as is now the case,—would become the means of restoring harmony and concord to the country and the government. It would make the Union a union in truth,—a bond of mutual affection and brotherhood;—and not a mere connection used by the stronger as the instrument of dominion and aggrandizement,—and submitted to by the weaker only from the lingering remains of former attachment, and the fading hope of being able to restore the government to what it was originally intended to be, a blessing to all.

Such is the disease,—and such the character of the only remedy which can reach it. In conclusion, there remains to be considered, the practical question,—Shall it be applied? Shall

the only power which can apply it be invoked for the purpose?

The responsibility of answering this solemn question, rests on the States composing the stronger section. Those of the weaker are in a minority, both of the States and of population; and, of consequence, in every department of the government. They, then, cannot be responsible for an act which requires the concurrence of two thirds of both houses of Congress, or two thirds of the States to originate, and three fourths of the latter to consummate. With such difficulties in their way, the States of the weaker section can do nothing, however disposed, to save the Union and the government, without the aid and co-operation of the States composing the stronger section: but with their aid and co-operation both may be saved. On the latter, therefore, rests the responsibility of invoking the high power, which alone can apply the remedy; —and, if they fail to do so, of all the consequences which may follow.

Having now finished what I proposed to say on the constitution and government of the United States, I shall conclude with a few remarks relative to the constitutions and governments of the individual States. Standing, as they do, in the relation of co-ordinates with the constitution and government of the United States, whatever may contribute to derange and disorder the one, must, necessarily contribute, more or less, to derange and disorder the other; and, thus, the whole system. And hence the importance,—viewed simply in re-

ference to the government of the United States, without taking into consideration those of the several States,—that the individual governments of each, as well as the united government of all, should assume and preserve the constitutional, instead of the absolute form of popular government,—that of the concurrent, instead of the numerical majority.

It is much more difficult to give to the governments of the States, this constitutional form, than to the government of the United States; for the same reason that it is more easy to form a constitutional government for a community divided into classes or orders, than for one purely popular. Artificial distinctions of every description, be they of States or Estates, are more simple and strongly marked than the numerous and blended natural distinctions of a community purely popular. But difficult as it is to form such constitutional governments for the separate States, it may be effected by making the several departments, as far as it may be necessary, the organs of the more strongly marked interests of the State, from whatever causes they may have been produced;—and by such other devices, whereby the sense of the State may be taken by its parts, and not as a whole—by the concurrent, and not by the numerical majority. It is only by the former that it can be truly taken. Indeed, the numerical majority often fails to accomplish that at which it professes to aim,—to take truly the sense of the majority. It assumes, that by assigning to every part of the State a representative in every department of its government, in

proportion to its population, it secures to each a weight in the government, in exact proportion to its population, under all circumstances. But such is not the fact. The relative weight of population depends as much on circumstances, as on numbers. The concentrated population of cities, for example, would ever have, under such a distribution, far more weight in the government, than the same number in the scattered and sparse population of the country. One hundred thousand individuals concentrated in a city two miles square, would have much more influence than the same number scattered over two hundred miles square. Concert of action and combination of means would be easy in the one, and almost impossible in the other; not to take into the estimate, the great control that cities have over the press, the great organ of public opinion. To distribute power, then, in proportion to population, would be, in fact, to give the control of the government, in the end, to the cities; and to subject the rural and agricultural population to that description of population which usually congregate in them,—and ultimately, to the dregs of their population. This can only be counteracted by such a distribution of power as would give to the rural and agricultural population, in some one of the two legislative bodies or departments of the government, a decided preponderance. And this may be done, in most cases, by allotting an equal number of members in one of the legislative bodies to each election district; as a majority of the counties or election districts will usually have a decided majority of its

population engaged in agricultural or other rural pursuits. If this should not be sufficient, in itself, to establish an equilibrium,—a maximum of representation might be established, beyond which the number allotted to each election district or city should never extend.

Other means of a similar character might be adopted, by which, the different and strongly marked interests of the States,—especially those resulting from geographical features, or the diversity of pursuits, might be prevented from coming into conflict, and the one secured againts the control of the other. By these, and other contrivances suited to the peculiar condition of a State, its government might be made to assume the character of that of a concurrent majority, and have all the tranquillity and stability belonging to such a form of government; and thereby avoid the disorder and anarchy in which the government of the numerical majority must ever end. While the government of the United States continues, it will, indeed, require a much less perfect government on the part of a State, to protect it from the evils to which an imperfectly organized government would expose it, than if it formed a separate and independent community. The reason is, that the States, as members of a Union, bound to defend each other against all external dangers and domestic violence, are relieved from the necessity of collecting and disbursing large amounts of revenue, which otherwise would be required; and are, thereby, relieved from that increased tendency to conflict and disorder which ever ac-

companies an increase of revenue and expenditures. In order to give a practical illustration of the mode in which a State government may be organized, on the principle of the concurrent majority, I shall, in concluding this discourse, give a brief account of the constitution and government of the State of South Carolina.

Its government, like that of all the other States, is divided into three departments,—the Legislative, Executive, and Judicial. Its executive powers, as in all the others, are vested in a single chief magistrate. He is elected by the legislature, holds his office for two years, and is not again eligible for two years after the expiration of the term for which he was elected. His powers and patronage are very limited. The judges are, also, appointed by the legislature. They hold their office during good behavior. The legislative department is, like that of all the other States, divided into two bodies, the Senate and the House of Representatives. The members of the former are divided into two classes, of which the term of one expires every other year. The members of the House are elected for two years. The two are called, when convened, the General Assembly. In addition to the usual and appropriate power of legislative bodies, it appoints all the important officers of the State. The local officers are elected by the people of the respective districts (counties) to which they belong. The right of suffrage, with few and inconsiderable exceptions, is universal. No convention of the people can be called, but by the concurrence of two thirds

of both houses;—that is,—two thirds, respectively, of the entire representative body. Nor can the constitution be amended, except by an act of the General Assembly, passed by two thirds of both bodies of the whole representation; and passed again, in like manner, at the first session of the assembly immediately following the next election of the members of the House of Representatives. But that which is peculiar to its constitution, and which distinguishes it from those of all the other States, is, the principle on which power is distributed among the different portions of the State. It is this, indeed, which makes the constitution, in contradistinction to the government. The elements, according to which power is distributed, are taxation, property, and election districts. In order to understand why they were adopted, and how the distribution has affected the operations of government, it will be necessary to give a brief sketch of the political history of the State.

The State was first settled, on the coast, by emigrants from England and France. Charleston became the principal town; and to it the whole political power of the colony, was exclusively confined, during the government of the Lords Proprietors,—although its population was spread over the whole length of its coast, and to a considerable distance inland, and the region occupied by the settlements, organized into parishes. The government of these was overthrown by the people, and the colony became a dependent on the Crown. The right of electing members to the popular branch of the legisla-

ture, was extended to the parishes. Under the more powerful protection of the Crown, the colony greatly increased, and extended still further inland, towards the falls of the great rivers;—carrying with them the same organization.

About the middle of the last century, a current of population flowed in from New Jersey, Pennsylvania, Maryland, Virginia, and North Carolina, to the region extending from the falls of the rivers to the mountains,—now known as the upper country, in contradistinction to the section lying below. Between the two settlements there was a wide unsettled space; and for a considerable length of time no political connection, and little intercourse existed between them. The upper country had no representation in the government, and no political existence as a constituent portion of the State, until a period near the commencement of the revolution. Indeed during the revolution, and until the formation of the present constitution, in 1790, its political weight was scarcely felt in the government. Even then, although it had become the most populous section, power was so distributed under the new constitution, as to leave it in a minority in every department of the government.

Such a state of things could not long continue without leading to discontent. Accordingly, a spirited movement or agitation commenced openly in 1794, the object of which was to secure a weight in the government, proportional to its population. Once commenced, it continued to increase with the growing population of that section, until its violence, and the

distraction and disorder which it occasioned, convinced the reflecting portion of both sections, that the time had arrived when a vigorous effort should be made to bring it to a close. For this purpose, a successful attempt was made in the session of 1807. The lower section was wise and patriotic enough to propose an adjustment of the controversy, by giving to each an equal participation in the government; and the upper section, as wisely and patriotically, waived its claims, and accepted the compromise. To carry it into execution, an act was passed during the session to amend the constitution, according to the form it prescribes; and again passed, in like manner, during the ensuing session,—an intervening election of the members of the House of Representatives having taken place,—and, thereby, became a part of the constitution as it now stands. The object intended to be effected will explain the provisions of the amendment; and why it was necessary to incorporate in the constitution the three elements above stated.

To effect this, the Senate, which consists of one member from each election district, except Charleston, which has two (one for each of its two parishes), remained unchanged. This, in consequence of the organization of the lower district into parishes, and these again into election districts, gave the lower section a decided preponderance in that branch of the legislature. To give the upper section a like preponderance in the House of Representatives, it became necessary to remodel it. For this purpose, there were assigned to this branch of the legislature,

one hundred and twenty-four members;—of which sixty-two were allotted to white population, and sixty-two to taxation; to be distributed according to the election districts,—giving to each the number it would be entitled to under the combined ratios of the two elements. To ascertain this proportion, from time to time, a census of the population was ordered to be taken every ten years, and a calculation made, at the same time, of the amount of the tax paid by each election district during the last ten years; in order to furnish the data on which to make the distribution. These gave to the upper section a preponderance, equally decisive, in the House of Representatives. And thus an equilibrium was established between the two sections in the legislative department of the government; and, as the governor, judges, and all the important officers under the government are appointed by the legislature,—an equilibrium in every department of the government. By making the election districts the element of which one branch of the legislature is constituted, it protects the agricultural and rural interests against the preponderance, which, in time, the concentrated city population might otherwise acquire;—and by making taxation one of the elements of which the other branch is composed, it guards effectually against the abuse of the taxing power. The effect of such abuse would be, to give to the portion of the State which might be overtaxed, an increased weight in the government proportional to the excess;—and to diminish, in the

same proportion, the weight of the section which might exempt itself from an equal share of the burden of taxation.

The results which followed the introduction of these elements into the constitution, in the manner stated, were most happy. The government,—instead of being, as it was under the constitution of 1790, the government of the lower section,—or becoming, subsequently, as it must have become, the government of the upper section, had numbers constituted the only element,—was converted into that of the concurrent majority, and made, emphatically, the government of the entire population,—of the whole people of South Carolina;—and not of one portion of its people over another portion. The consequence was, the almost instantaneous restoration of harmony and concord between the two sections. Party division and party violence, with the distraction and disorder attendant upon them, soon disappeared. Kind feelings, and mutual attachment between the two sections, took their place,—and have continued uninterrupted for more than forty years. The State, as far as its internal affairs are concerned, may be literally said to have been, during the whole period, without a party. Party organization, party discipline, party proscription,—and their offspring, *the spoils principle*, have been unknown to the State. Nothing of the kind is necessary to produce concentration; as our happy constitution makes an united people,—with the exception of occasional, but short local dissensions, in reference to the action of the federal government;—and even

the most violent of these ceased, almost instantly, with the occasion which produced it.

Such are the happy fruits of a wisely constituted Republic;—and such are some of the means by which it may be organized and established. Ours, like all other well constituted constitutional governments, is the offspring of a conflict, timely and wisely compromised. May its success, as an example, lead to its imitation by others;—until our whole system, —the united government of all the States, as well as the individual governments of each,—shall settle down in like concord and harmony.

THE END.

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